Supreme Court, U.S.
FILED

No. 09- 09-903 JAN 25 2010

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IN THE

Supreme Court of the United States

MICHAEL SHREFFLER,

Petitioner,

v.

DARRYL L. LEWIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether the Eighth Amendment's Cruel and Unusual Punishment Clause applies to use of force claims brought pursuant to 42 U.S.C. § 1983 by convicted inmates who have not yet been sentenced.

II.

Whether the legal standard used to evaluate § 1983 use of force claims under the Eighth Amendment should also be used to evaluate use of force claims under the substantive due process component of the Fourteenth Amendment.

III.

Whether the Seventh Circuit, in rejecting Petitioner's qualified immunity defense, failed to heed this Court's pronouncements in *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861 (1979), and *Whitley v. Albers*, 475 U.S. 312, 106 S. Ct. 1078 (1986), to give the correctional officer the proper deference in the use of a Taser on a known violent and unruly jail inmate.

PARTIES TO THE PROCEEDINGS

Respondent Darryl Lewis brought this action for money damages pursuant to 42 U.S.C. § 1983 for violation of the Eighth Amendment against the County of Kankakee, Chief of Corrections Michael Downey, Correctional Officers Michael Shreffler, Todd Schloendorf, Miguel Ayala, and jail nurse Jean Flageole. The Seventh Circuit affirmed summary judgment in favor of all defendants except Petitioner Michael Shreffler. There are no other parties to these proceedings.

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OPINIONS BELOW

The decision of the Seventh Circuit Court of Appeals is reported at *Lewis v. Downey*, 581 F.3d 467 (7th Cir. 2009), and is reproduced in Appendix A. The decision of the District Court for the Central District of Illinois is not reported but is reproduced in Appendix B.

JURISDICTIONAL STATEMENT

The Seventh Circuit Court of Appeals rendered its decision on September 4, 2009. Petitioner's timely petition for rehearing and rehearing *en banc* was denied on October 27, 2009 (App. C). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment VIII; United States Constitution, Amendment XIV, § 1; and, 42 U.S.C. § 1983 are implicated in this case.

United States Constitution, Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Amendment XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable

exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Lower court proceedings

Respondent Darryl Lewis, a convicted federal inmate,[1] filed a *pro se* complaint pursuant to 42 U.S.C. § 1983 against the Petitioner Michael Shreffler and the County of Kankakee, Chief of Corrections Michael Downey, Correctional Officers Todd Schloendorf, Miguel Ayala, and jail nurse Jean Flageole. In his complaint, Lewis sought money damages for constitutional injuries that he allegedly suffered while he was awaiting sentencing at the Jerome Combs Detention Center in Kankakee, Illinois.

On July 2, 2008, the district court entered an order granting summary judgment in favor of all defendants and subsequently denied Lewis's post-judgment motions. Lewis appealed the decision to the Seventh Circuit only as it related to his Eighth Amendment use of force claim against Shreffler and Ayala and his Fourteenth Amendment procedural due process claim that he was placed in segregation without a hearing by Schloendorf. The Seventh Circuit affirmed the district

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1. The Kankakee County Sheriff operates the Jerome Combs Detention Center ("JCDC") in Kankakee, Illinois. In addition to state detainees, the JCDC also houses federal inmates pursuant to a contract with the United States Marshall's Office.

court's judgment as to the claims against Ayala and Schloendorf, but reversed the grant of summary judgment as to the use of force claim against Shreffler. Shreffler's petition for rehearing and rehearing *en banc* was subsequently denied by the Seventh Circuit on October 27, 2009.

B. Statement of Facts

On January 26, 2006, Lewis started a fistfight with another inmate, Darwin Brown. Correctional Officer Adam Brinkman observed Lewis approach Brown from behind and swing at him. Brinkman called for assistance and ordered all inmates to lock up. Despite Brinkman's order, Lewis threw another punch at Brown, this time striking him. Lewis repeatedly punched Brown even after other inmates attempted to separate them. Several correctional officers entered the cellblock and ordered the inmates to stop. Corporal Todd Schloendorf attempted to restrain Lewis by putting his arm around him, placing him in a headlock, and taking him to the ground. Lewis was placed in segregation in the maximum security area of the jail as a result of the incident.[2]

On February 6, 2006, while still housed in a maximum security cell, Lewis pushed the intercom button from his cell and screamed and yelled that he

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2. This was not Lewis's only altercation at the Jerome Combs Detention Center. Lewis had been previously sanctioned "quite a few times" for fighting.

had pills in his cell, and that he was going to ingest them unless he saw the nurse. Corporal Marlin Woods spoke with the nurse about Lewis's statements and then told Lewis that he could not see the nurse because he had earlier refused medical treatment. Lewis held up a bottle of pills to the security camera located in his cell and told Woods to "forget about it" and that he would "take care of [the] pain" himself, implying a suicide threat. Lewis then became angry and threw the pills on the cell floor.

Corporal Woods requested that Shreffler and Ayala accompany him to Lewis's cell so that he could check on Lewis and shake down his cell to remove the pills and any contraband.[3] The officers then entered Lewis's cell. Shreffler, carrying a Taser [4] in his hand, ordered Lewis

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3. Both Woods and Ayala knew Lewis to be an inmate who frequently refused orders, was combative and had a propensity to fight.

4. Taser is a registered trademark of TASER International, Inc. A Taser is an electronic control device that operates by firing two probes attached by electrical-conducting wires into the target individual, sending pulses of low amperage, high voltage electricity through the wires, which results in temporary immobilization and an immediate loss of the target's neuromuscular control for the duration of the electrical pulse. *See Sanders v. City of Fresno*, 551 F. Supp. 2d 1149, 1158 n.15 (E.D. Cal. 2008); *also* TASER International, Inc.'s website, http://www.taser.com/research/Pages/FAQGeneral.aspx. The District Court in *Beaver v. City of Federal Way*, 507 F. Suppl. 2d 1137, 1142-43 (W.D. Wash. 2007), explained the Taser's effects:

> The Taser is not designed to use pain as a principal motivator. Instead, the pulses cause a break in the
>
> (Cont'd)

to stand up, but Lewis refused to comply. At his deposition, Lewis described his behavior as follows: "I was slug. The only thing I did was like . . . turn my head over and just looked at him". Corporal Woods then ordered Shreffler to deploy his Taser, which Shreffler did by shooting Lewis once in his right leg.[5] Lewis slid out of his bed and onto the floor. He was then handcuffed and removed from his cell. Lewis conceded at his deposition that he did not suffer any injuries, only a temporary shocking from the use of the Taser.

(Cont'd)

> body's central nervous system signaling, resulting in involuntary muscle contractions. This will generally result in the target falling, if standing, or in preventing a target on the ground from standing. The effect is generally temporary. Although infliction of pain as a motivator is not the primary function of a properly deployed Taser, pain is a necessary byproduct of its use. However, it is also a very useful tool for law enforcement, as it is considered to inflict considerably less pain on a suspect than other forms of force available to an officer.

507 F. Supp. 2d at 1142-43.

5. In Woods's professional experience as a supervisor, he believed that using a Taser on Lewis was the safest method of restraint given in part to Lewis's propensity to fight and his refusal of Shreffler's order.

REASONS FOR GRANTING THE PETITION

This case raises important federal questions concerning the applicable constitutional amendment and correct legal standard to be followed by correctional officers in their use of force to maintain order and security in county jails. The Seventh Circuit joined the Third Circuit in applying the Fourteenth Amendment Due Process Clause to Section 1983 claims brought by convicted inmates awaiting sentencing. In contrast, the majority of the circuits which have addressed this issue – the Second, Fifth, Eighth, Ninth, Tenth, and Eleventh – have applied an entirely different amendment: the Eighth Amendment's Cruel and Unusual Punishment Clause. The Seventh Circuit's opinion also conflicts with the holdings of the Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits concerning the proper standard to be applied to use of force claims arising under the Fourteenth Amendment's Due Process Clause. Finally, this case also presents issues regarding the proper deference to be given a correctional officer in the use of a Taser on a known violent and unruly inmate, and whether the Seventh Circuit's application of the undisputed facts and divergent case law resulted in the erroneous denial of Petitioner's qualified immunity defense. This Court should exercise its discretion and grant the petition for *writ of certiorari* in order to provide guidance to correctional officers and administrators, as well as the lower courts, on these important issues.

Although this Court has held that the Due Process Clause of the Fourteenth Amendment applies generally to pretrial detainees, *see Bell v. Wolfish*, 441 U.S. 520,

535, 99 S. Ct. 1861 (1979), and that the Cruel and Unusual Punishment Clause of the Eighth Amendment applies to convicted inmates, *see Whitley v. Albers*, 475 U.S. 312, 318-326, 109 S. Ct. 1078 (1986), it has not yet defined precisely where the line is drawn between these two categories for the purposes of evaluating use of force claims. Given the different allowances under the Fourteenth and Eighth Amendments – the latter permitting punishment so long as it is not cruel and unusual, and the former disavowing punishment altogether – this is more than a mere academic inquiry.[6] The federal circuit courts are sharply divided over this issue in the absence of direct precedent from this Court. *See, e.g., Lewis v. Downey*, 581 F.3d 467, 473 (7th Cir. 2009) (applying the Fourteenth Amendment to claims brought by pre-sentence inmates); *Tilmon v. Prator*, 268 F.3d 521, 523-24 (5th Cir. 2004) (holding that conviction is the trigger for Eighth Amendment protection); *Fuentes v. Wagner*, 206 F.3d 335, 341 (3rd Cir. 2000) (drawing the Eighth Amendment line at sentencing).

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6. Resolution of these issues will greatly impact the operation of county jails across the nation. According to the Bureau of Justice Statistics, in 2008, 785,556 individuals were confined nationally in county jails. This represents thirty-four (34) percent of the total population of confined persons within the United States. *Correctional Populations*, U.S. Bur. Justice Stat., available at *http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm*. County jails routinely house the full spectrum of inmates: arrestees released on bail; pretrial detainees pending trials; convicted prisoners awaiting sentencing or transport to prisons; and, convicted prisoners serving a sentence under one year. Guidance from this Court is needed so that correctional officers understand whether the status of an inmate makes a difference in the use of force context.

Equally unsettled is the correct legal standard to be followed by correctional officers in their use of force under substantive due process. While this Court has addressed use of force claims brought under both the Fourth and Eighth Amendments, it has yet to address how these claims should be evaluated under the Fourteenth Amendment. The circuit courts have used a variety of standards, including the Fourth Amendment's reasonableness inquiry, *see, e.g., Andrews v. Neer*, 253 F.3d 1052, 1060-61 (8th Cir. 2001), the Eighth Amendment's malice standard, *see, e.g., Valencia v. Wiggins*, 981 F.2d 1440, 1446 (5th Cir. 1993), the "shocks the conscience" standard from *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708 (1998), *see e.g., Harris v. City of Circleville*, 583 F.3d 356, 365 (6th Cir. 2009), and hybrids of all these schemes, *see, e.g., Danley v. Allen*, 540 F.3d 1298, 1306 (11th Cir. 2008); *Darrah v. City of Oak Park*, 255 F.3d 301, 306 (6th Cir. 2001). In noting this Court's silence on the issue, the Seventh Circuit in the instant case fell back on the Eighth Amendment standard in evaluating Lewis's claim. This default position, while a common solution reached by several federal appellate courts, does not resolve the recurring issue of whether another standard, beyond the Eighth Amendment, applies to use of force claims brought in the jail setting.

Finally, in rejecting Petitioner's qualified immunity defense, the Seventh Circuit failed to give Petitioner the proper deference in choosing to use a Taser as a means of managing a known violent and unruly inmate. *See Whitley*, 475 U.S. at 321-22; *Bell*, 441 U.S. at 547 n.29. As law enforcement increases its use of Tasers and

other electronic control devices,[7] litigation concerning the use of these devices has been gaining momentum. *See Brown v. City of Golden Valley*, 574 F.3d 491,498 (8th Cir. 2009) (noting that case law involving the use of Tasers is new and developing). Some courts have viewed Tasers as safe and valuable law enforcement tools, while others have equated them to more intense and dangerous weapons in an officer's arsenal. *Compare Draper v. Reynolds*, 369 F.3d 1270, 1278 (11th Cir. 2008), *with Hickey v. Reeder*, 12 F.3d 754, 757 (8th Cir. 1993). Guidance from this Court is needed so that correctional officers know that, in their professional judgment based on the rapidly evolving and often dangerous circumstances of the moment, they can effectively control disruptive inmates using a Taser or other electronic control device so that injury to both the inmates and officers can be avoided and institutional order and security can be restored.

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7. According to the National Institute of Justice, 11,500 law enforcement agencies have acquired approximately 260,000 electronic control devices in operational settings. *Study of Deaths Following Electro Muscular Disruption: Interim Report*, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, June 2008, at 1 (available at *http://www.ncjrs.gov/pdffiles1/nij/222981.pdf*).

I. THIS COURT SHOULD RESOLVE THE CIRCUIT COURT CONFLICT AND CLARIFY WHETHER THE EIGHTH OR THE FOURTEENTH AMENDMENT APPLIES TO USE OF FORCE CLAIMS BROUGHT PURSUANT TO 42 U.S.C. § 1983 BY CONVICTED INMATES NOT YET SENTENCED

In *Graham v. Connor*, this Court "reject[ed] the notion that all excessive force claims brought under § 1983 are governed by a single generic standard." 490 U.S. 386, 393, 109 S. Ct. 1865 (1989). Rather, the analysis of a use of force claim begins with identifying the constitutional right at issue. *Id.* at 394. This inquiry hinges on the status of the individual alleging excessive force within the criminal proceedings. *Id.* When a use of force claim arises in the context of an arrest, the Fourth Amendment's protections against unreasonable seizures apply. *Id.* Prisoners awaiting trial, on the other hand, are protected by the Due Process Clause of the Fourteenth Amendment, *Bell v. Wolfish*, 441 U.S. 520, 535, 99 S. Ct. 1861 (1979), while the Eighth Amendment's proscription against cruel and unusual punishment provides protection for convicted prisoners. *Whitley v. Albers*, 475 U.S. 312, 318-326, 106 S. Ct. 1078 (1986). Not all persons alleging excessive force, however, fit neatly into these fixed categories.

This Court's jurisprudence has yet to clarify the issue. In *Ingraham v. Wright*, 430 U.S. 651, 97 S. Ct. 1401 (1970), this Court held that the Eighth Amendment is inapplicable when public school teachers impose corporal punishment on students. The Court explained

that "the State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a *formal adjudication of guilt* in accordance with due process of law." *Id.* at 671 n.40 (emphasis added). *Ingraham* never explained whether "a formal adjudication of guilt" included sentencing or just the traditional proceedings associated with obtaining a criminal conviction.

In the instant case, the Seventh Circuit turned to a footnote in *Graham* for guidance in defining "a formal adjudication of guilt." *Lewis*, 581 F.3d at 474 (*citing Graham*, 490 U.S. at 392 n.6). This footnote, however, was *dicta* and hardly definitive. The footnote described Judge Friendly's excessive force analysis from *Johnson v. Glick*, 481 F.2d 1028 (1973).[8] Interestingly, this Court later noted – in another footnote – that the Eighth Amendment attaches after conviction. *Graham*, 490 U.S. at 395 n.10 (*quoting Whitley*, 475 U.S. at 327 ("After conviction, the Eighth Amendment 'serves as the

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8. The footnote reads:

> "Judge Friendly did not apply the Eighth Amendment's Cruel and Unusual Punishments Clause to the detainee's claim for two reasons. First, he thought that the Eighth Amendment's protections did not attach until after conviction and sentence. 481 F.2d at 1032. This view was confirmed by *Ingraham v. Wright*, 430 U.S. 651, 671 n. 40 (1977) ("Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions") . . ."

Graham, 490 U.S. at 392 n.6.

primary source of substantive protection . . .'")). Contrary to the Seventh Circuit's interpretation, therefore, neither the footnotes in *Graham* nor Judge Friendly's analysis in *Johnson* elucidate at what point Eighth Amendment rights vest.

Other Supreme Court jurisprudence provides no better direction. In *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861 (1979), this Court first announced that the origin for constitutional rights of pretrial detainees is the Due Process Clause of the Fourteenth Amendment. This Court explained that a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law. *Bell*, 441 U.S. at 535-36 (*citing Ingraham*, 430 U.S. at 671-72 n.40). Other than noting that the State acquires the power to punish "only after it complies with constitutional guarantees traditionally associated with criminal prosecutions," this Court did not address the specific nuance of determining precisely what is meant by "pretrial detainee" or when the proscriptions of the Eighth Amendment begin. *Bell*, 441 U.S. at 535 n.16.

In the absence of direct precedent from this Court, the federal appellate courts have reached conflicting results. For example, in *Hamm v. DeKalb County*, 74 F.2d 1567 (11th Cir. 1985), an inmate claimed that he endured unconstitutional jail conditions both before and after his conviction. Using the inmate's conviction as the division between the two, the Eleventh Circuit evaluated the claims under the Cruel and Unusual Punishment Clause and the Due Process Clause. *Id.* at 1572 (*citing Ingraham*, 430 U.S. at 671-72, and *Bell*, 441 U.S. at 520).

Similarly, the Tenth Circuit in *Berry v. City of Muskogee*, 900 F.2d 1489 (10th Cir. 1990), reached the same conclusion when it considered the claims of a widow of an inmate who was killed by fellow inmates in the jail. The inmate was awaiting sentencing at the time of his death. The Tenth Circuit rejected the widow's argument that her failure to protect claim should be evaluated under the Due Process Clause. *Id.* at 1492-93 (*citing Bell*, 441 U.S. at 534-35). The court reasoned that a convicted inmate awaiting sentencing is being detained primarily for punitive purposes, not merely to ensure his presence at trial. *Id.* at 1493. The Tenth Circuit explained:

> We see no reason to treat incarcerated persons whose guilt has been adjudicated formally but who await sentencing like pretrial detainees, who are detained primarily to ensure their presence at trial and who cannot be punished [citation]; and we perceive every reason to treat those awaiting sentencing the same as inmates already sentenced. The critical juncture is conviction, either after trial or, as here, by plea, at which point the state acquires the power to punish and the Eighth Amendment is implicated.

Id. (*citing Bell*, 441 U.S. at 534-35, *Ingraham*, 430 U.S. at 664, 671 n. 40). Judge McKay concurred in part and dissented in part, disagreeing with the court's conclusion that the Eighth Amendment was applicable to pre-sentence inmates' claims. *Id.* at 1507-08 (McKay, dissenting). Acknowledging that this Court has yet to decide the issue, Justice McKay noted that a criminal

defendant retains a number of rights until sentencing and that the Fourteenth Amendment's right to be free from punishment should be among them. *Id.* at 1508.

The Third Circuit in *Fuentes v. Wagner*, 206 F.3d 335 (2000), considered other circumstances where sentencing is the turning point in criminal proceedings. The Third Circuit relied on *Cobb v. Aytch*, 643 F.2d 946, 962 (3d Cir. 1981), a right to bail case in which the court stated that "[t]he right to remain at liberty continues until a court pronounces a judgment of sentence." The *Cobb* court based its decision on the fact that state statutory law allowed un-sentenced defendants a right to bail, and that un-sentenced prisoners retained their Sixth Amendment rights to counsel and a speedy trial. *Cobb*, 643 F.2d at 926. After considering the decisions in *Cobb* and *Bell*, the *Fuentes* court stated it was "simply wrong" as a matter of law that a convicted inmate awaiting sentencing should have the same status as a sentenced inmate. *Fuentes*, 206 F.3d at 341 (*citing Bell*, 441 U.S. at 538).

Expressly rejecting the Third Circuit's holding in *Fuentes*, the Fifth Circuit more recently in *Tilmon v. Prator*, 368 F.3d 521 (5th Cir. 2004), affirmed a district court's decision to draw the line at conviction. In doing so, the court discussed the holdings of *Cobb*, *Fuentes*, and *Berry*, and concluded that "the adjudication of guilt, i.e., the conviction, and not the pronouncement of sentence, is the dispositive fact with regard to punishment in accordance with due process." *Tilmon*, 368 F.3d at 523. The *Tilmon* court made a careful examination of this Court's pronouncements in *Bell* and concluded that punishment, such as the punishment

announced at sentencing, can only follow a determination of guilt after trial or plea. *Id.* at 523-24.

Other courts have struggled with this issue since *Bell* and would benefit from this Court's guidance. *See Whitnack v. Douglas County*, 16 F.3d 954 (8th Cir. 1994) (analyzing a pre-sentence inmate's condition of confinement claim under the Eighth Amendment); *Resnick v. Hayes*, 213 F.3d 443 (9th Cir. 2000) (using the Eighth Amendment standards to analyze the constitutionality of a pre-sentence inmate's placement in disciplinary segregation); *Estate of Gaither v. District of Columbia*, No. 03-1458, __ F. Supp. 2d __, 2009 WL 2916976, at *13 (D.D.C. Sept. 8, 2009) (declining to decide the issue as the inmate's conditions of confinement claim would be judged under the same standard regardless of the constitutional provision involved); *Athill v. Speziale*, No. 06-4941, 2009 WL 1874194, at *7-8 (D.N.J. June 30, 2009) (unpublished order) (holding that a pre-sentence inmate was protected from excessive force under the Due Process Clause); *Jeanty v. County of Orange*, 379 F. Supp. 2d 533 (S.D.N.Y. 2005) (finding that Eighth Amendment rights vest upon conviction, not sentencing).

The question of whether convicted inmates awaiting sentencing are protected under the Eighth or Fourteenth Amendment is a recurring issue which has clearly caused confusion among the federal appellate circuit courts. This case presents a prime opportunity for this Court to consider this issue and resolve the circuit courts' conflict. This Court, therefore, should exercise its resources in favor of granting *certiorari* in order to provide guidance to jail administrators and lower courts.

II. THIS COURT SHOULD RESOLVE THE CIRCUIT COURT CONFLICT AND CLARIFY THE LEGAL STANDARD TO BE FOLLOWED BY CORRECTIONAL OFFICERS IN THEIR USE OF FORCE ON INMATES DETAINED IN COUNTY JAILS

While this Court has noted that a pretrial detainee's Due Process rights "are at least as great as the Eighth Amendment protections available to a convicted prisoner," *City of Revere v. Massachusetts General Hosp.*, 463 U.S. 239, 244, 103 S. Ct. 2979 (1983) (*citing Bell v. Wolfish*, 441 U.S. 520, 535 n.16, 99 S. Ct. 1861 (1979)), it has left open the question of what standard should apply to use of force claims brought under the substantive due process component of the Fourteenth Amendment. *See, e.g., Fuentes v. Wagner*, 206 F.3d 335, 344 (2000) ("no determination has as yet been made regarding how much more protection unconvicted prisoners should receive [than convicted prisoners]"); *Wilson v. Williams*, 83 F.3d 870, 875 (7th Cir. 1996) ("Whether the standard for excessive force claims is the 'reasonableness' standard of the Fourth Amendment, or some other intermediate standard, the Supreme Court has declined to say.").

In *Bell*, this Court held that the Due Process Clause of the Fourteenth Amendment protects pretrial detainees from conditions of confinement that "amount to punishment." 441 U.S. at 535. To state a constitutional violation, a pretrial detainee must establish that he was subjected to a disability or restrictive condition that harmed him beyond merely interfering with his "desire to be free from discomfort" during confinement.

Id. at 537. Whether a condition amounts to "punishment," depends on whether it is imposed for the purpose of punishment or whether it is incidental to some other legitimate penological purpose. *Id.* at 538. Absent proof of an intent to punish, "that determination generally will turn on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable to it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'" *Id.* (*quoting Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554 (1963)).

Although *Bell* is instructive on which constitutional amendment applies generally in the pretrial detention context, it is not a use of force case and, therefore, contributes little to the use of force analysis. *Bell* involved institutional conditions and practices, including double bunking, strip searches, inadequate recreational, educational and employment opportunities, insufficient staff, and restrictions on the purchase and receipt of personal items and books. The regulatory nature of these practices prompted this Court to apply the factors identified in *Kennedy* in determining whether a governmental act is punitive.[9] The *Kennedy* factors,

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9. "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the (Cont'd)

however, cannot be readily applied to the use of force context. *See Telfair v. Gilberg*, 868 F. Supp. 1396, 1411 (S.D. Ga. 1994). *Bell*, therefore, does not provide a standard for use of force claims.

This Court's decision in *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708 (1998), although instructive, adds only confusion to the mix. In *County of Sacramento*, this Court clarified the standard of culpability on the part of a police officer for violating substantive due process in a pursuit case. *Id.* Employing a "shocks the conscience" standard, this Court rejected the "deliberate indifference" test associated with prison medical care claims and, instead, analogized police pursuit claims with Eighth Amendment use of force claims under *Whitley v. Albers*, 475 U.S. 312, 318-326, 106 S. Ct. 1078 (1986), where a higher standard of fault (malicious and sadistic intent to harm) was required to state a constitutional claim. *Id.* at 849-55. This Court reasoned that:

> [L]iability for deliberate indifference to inmate welfare rests upon the luxury enjoyed by prison officials of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations. When such extended opportunities to do better are teamed with protracted failure even to care,

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(Cont'd)

inquiry, and may often point in differing directions." *Bell*, 441 U.S. at 537-38 (*quoting Kennedy*, 372 U.S. at 168-69) (footnotes omitted)).

> indifference is truly shocking. But when unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates "the large concerns of the governors and the governed." [citation] Just as a purpose to cause harm is needed for Eighth Amendment liability in a riot case, so it ought to be needed for due process liability in a pursuit case.

Id. at 853 (citations omitted). After analyzing the facts, this Court affirmed summary judgment for the defendant officer, concluding that the officer did not harbor "an improper or malicious motive" in pursuing the suspected law violator. *Id.* at 855.

The lack of direction by this Court has caused the federal appellate courts to employ a myriad of conflicting standards in evaluating substantive due process violations in the use of force context. Several circuit courts have merged the Fourteenth Amendment standard with the Eighth Amendment standard outlined in *Whitley*, and expounded on in *Hudson v McMillian*, 503 U.S. 1, 112 S. Ct. 995 (1992), and *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508 (2002). For example, the Fifth Circuit in *Valencia v. Wiggins*, 981 F.2d 1440 (5th Cir. 1993), *cert. denied*, 509 U.S. 905 (1993), concluded that it was impractical to draw a line between convicted prisoners and pretrial detainees for the purpose of maintaining jail security. Therefore, the court stated that the standard announced in *Whitley* and *Hudson* should guide courts in evaluating pretrial detainee use

of force claims. *Valencia*, 981 F.2d at 1446. *See also Danley v. Allen*, 540 F.3d 1298, 1306 (11th Cir. 2008) (*citing Bozeman v. Orum III*, 422 F.3d 1266, 1271 (11th Cir. 2005) ("it makes no difference whether [the inmate] was a pretrial detainee or a convicted prisoner because 'the applicable standard is the same, so decisional law involving prison inmates applies equally to cases involving . . . pretrial detainees'")); *Fuentes*, 206 F.3d at 341 (3rd Cir. 2000) (Eighth Amendment standards apply to a pretrial detainee's use of force claim arising in the context of a prison disturbance); *U.S. v. Walsh*, 194 F.3d 37, 48 (2d Cir. 1999) ("we conclude that the *Hudson* analysis is applicable to excessive force claims brought under the Fourteenth Amendment as well"); *Taylor v. McDuffie*, 155 F.3d 479, 483 (4th Cir. 1998) (applying *Whitley* analysis); *Orem v. Rephann*, 523 F.3d 442 (4th Cir. 2008) (applying *Whitley*); *Athill v. Speziale*, No. 06-4941, 2009 WL 1874194, at *8 (D.N.J. June 30, 2009) (collecting cases).

A few circuits use the Fourth Amendment's objective reasonableness standard. *See Andrews v. Neer*, 253 F.3d 1052, 1060-61 (8th Cir. 2001); *Moore v. Novak*, 146 F.3d 531 (8th Cir. 1998); *Gibson v. County of Washoe*, 290 F.3d 1175, 1197 (9th Cir. 2002). Other circuits have used an intermediate standard between the Fourth Amendment's objective inquiry and the Eighth Amendment subjective standard. The Seventh Circuit in *Wilson v. Williams*, 83 F.3d 870 (7th Cir. 1996), for example, concluded that collapsing the Eighth and Fourteenth Amendment analyses eviscerates this Court's holding in *Bell*. Therefore, the Seventh Circuit requires a pretrial inmate alleging excessive force to prove that the defendants "acted deliberately or with

callous indifference, evidenced by an actual intent to violate [the plaintiff's] rights or reckless disregard for his rights." *Wilson*, 83 F.3d at 875 (*quoting Anderson v. Gutschenritter*, 836 F.2d 346, 349 (7th Cir. 1988)); *see also Telfair*, 868 F. Supp. 1396 (using an intermediate standard devised by district court).

Still other courts have followed *County of Sacramento*'s analysis. Noting that "[a] substantially higher hurdle must be surpassed to make a showing of excessive force under the Fourteenth Amendment than under the 'objective reasonableness' test of *Graham*," the Sixth Circuit in *Harris v. City of Circleville*, 583 F.3d 356, 365 (6th Cir. 2009), concluded that the Due Process Clause only protects against conduct that "shocks the conscience" *Harris*, 583 F.3d at 365; *see also Darrah v. City of Oak Park*, 255 F.3d 301, 306 (6th Cir. 2001) ("shocks the conscience" standard applicable to pretrial detainee's excessive force claim); *but see Telfair*, 868 F. Supp. at 1409-10 (rejecting a "shocks the conscience" standard for pretrial detainee's excessive force claims because "it would rarely be met").

A review of the above case law, therefore, demonstrates the need for this Court to establish the proper constitutional framework for evaluating use of force claims under substantive due process protections. Is it *Bell*'s "punishment" standard? Is it a merger with *Whitley* and *Hudson*'s "malice" standard, as implied by *County of Sacramento v. Lewis*? Or, is it some intermediate standard of culpability, such as the "deliberate indifference" standard used to evaluate medical care claims in both the pretrial and post-conviction case law? Correctional officers, as well as the

lower courts, need guidance from this Court on what legal standard to apply in Fourteenth Amendment use of force cases. Accordingly, this Court should exercise its discretion and grant a *writ of certiorari*.

III. IN REJECTING THE PETITIONER'S QUALIFIED IMMUNITY DEFENSE, THE SEVENTH CIRCUIT FAILED TO GIVE PETITIONER THE PROPER DEFERENCE IN HIS USE OF A TASER ON A KNOWN VIOLENT AND UNRULY INMATE

In rejecting Petitioner's qualified immunity defense, the Seventh Circuit failed to give Petitioner the proper deference, as required under *Whitley v. Albers*, 475 U.S. 312, 106 S. Ct. 1078 (1986) and *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861 (1979), in his decicion to use a Taser to control a known violent and unruly inmate. This Court in *Whitley* held that correctional officials should be accorded wide-ranging deference in adopting and executing policies and practices that, in their professional judgment, are needed to preserve internal order and discipline and maintain security. *Whitley*, 475 U.S. at 321-22; *accord Bell*, 441 U.S. at 547 n.29 (holding that deference applies regardless of whether the circumstances involve pretrial inmates or convicted prisoners). Such deference applies not only to actual confrontations with inmates but also "to prophylactic or preventative measures intended to reduce the incidence of these or any other breaches of prison discipline." *Whitley*, 475 U.S. at 322. A judge or jury should not "freely substitute their judgment for that of officials who have made a considered choice." *Id.*

In *Whitley*, this Court held that the Eighth Amendment proscribes only the unnecessary and wanton infliction of pain. This Court explained:

> The infliction of pain in the course of a prison security measure, therefore, does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force authorized or applied for security purposes was unreasonable, and hence unnecessary in the strict sense.

Id. This Court explained that a correctional officer's decision to use force in response to a disturbance must necessarily take into account the potential risk that the disturbance presents to inmates and officers. *Id.* at 320.

Against that backdrop, this Court needs to address whether the Seventh Circuit properly accorded Petitioner the deference required under *Whitley* and *Bell*. Tasers are an effective, non-lethal, hands-off means for correctional officers to incapacitate an inmate at a safe distance. As such, they have become invaluable additions to correction officers' arsenals, giving them an alternative weapon when firearms, batons, pepper spray, or hand-to-hand combat are impractical or unsafe. *See Beaver v. City of Federal Way*, 507 F. Supp. 2d 1137, 1142-43 (W.D. Wash. 2007) (noting that a Taser inflicts considerably less pain than other forms of force and that it is a valuable tool for protecting law enforcement officers by providing an enlarged safety zone around the officer). Use of a Taser is appropriate to diffuse a situation so as to prevent the need for escalating force. *Sanders v. City of Fresno*, 551 F. Supp. 2d 1149, 1172

(E.D. Cal. 2008). Like mace and water hoses, a Taser or stun gun permits an officer "to perform his duty without physical confrontation between staff and inmate" and often is the safest means available to enforce prison security. *Soto v. Dickey*, 744 F.2d 1260, 1263 (1984); *see also See Danley v. Allen*, 540 F.3d 1298, 1307-08 (11th Cir. 2008) (collecting cases where pepper spray use was found not disproportionate to the need to control an inmate who fails to comply with jailers' orders).

The effective and safe use of the Taser in the instant case aptly demonstrates why correctional officers should be allowed more latitude than the Seventh Circuit permitted. Lewis undisputedly had a past history of violence against other inmates and correctional officers. He was known to be combative and frequently disobedient. On the day in question, he acted aggressively and defiantly by screaming and yelling over the intercom, angrily throwing a bottle of pills on the floor, and refusing to immediately get up to be handcuffed. Based on these facts, there was certainly a reasonable basis for the officers to perceive that Lewis presented a threat of violence. In the exercise of their professional judgment and discretion, the officers should not have to wait for that threat to immediately materialize before taking action to prevent further disturbance. *See Danley*, 540 F.3d at 1307-08 . Indeed, by using a Taser to momentarily incapacitate Lewis, as opposed to going "hands on" and, thereby, risking a potential fight and injury to officers and even Lewis himself, the officers chose, in their professional discretion, a minimally dangerous and intrusive means to preserve order and security.

It is also relevant that Lewis, admittedly, did not incur any injury as a result of being shot with the Taser. *See Hudson v. McMillian*, 503 U.S. 1, 7, 112 S. Ct. 995 (1992). Indeed, courts have held that a single shot from a Taser does not inflict a serious injury. *See, e.g., Draper v. Reynolds*, 369 F.3d 1270, 1278 (11th Cir. 2004); *Buckley v. Haddock*, 292 Fed. Appx. 791, 795, 2008 WL 4140297 (11th Cir. 2008) (unpublished) (holding that Tasers do not "pose a substantial risk of causing serious bodily injury").[10] Thus, in light of the deference that should have been afforded Officer Shreffler, combined with the plausible need for application of force, the single deployment of the Taser to Lewis's right thigh, and the lack of any injury resulting from the event, the Seventh Circuit erred in finding an inference of malicious intent sufficient to support a constitutional violation and to deny summary judgment.

Alternatively, the Seventh Circuit erred in finding that, based on the existing case law, "a reasonable officer would understand that employing a Taser gun under the version of the facts that Lewis has described would violate the prisoner's constitutional rights." *Lewis v. Downey*, 581 F.3d 467,479 (2009). At the onset, the Seventh Circuit's denial of qualified immunity ignores the issues presented in Parts I and II, *supra*. A county jail officer examining the case law would be confused at

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10. According to National Institute of Justice, there is no conclusive medical evidence that indicates a high risk of serious injury or death from the direct effects of a Taser. *Study of Deaths Following Electro Muscular Disruption: Interim Report*, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, June 2008, at 3 (available at *http://www.ncjrs.gov/pdffiles1/nij/222981.pdf*)

best in his attempt to understand and apply the correct constitutional provision and standard depending on the status of a particular inmate at any given time in the county jail.

Moreover, the lower courts have treated electronic control devices with varying degrees of favor and skepticism. In *Caldwell v. Moore*, 968 F.2d 595 (6th Cir. 1992), for example, the Sixth Circuit held that the use of stun gun against a disobedient, mentally ill prisoner did not violate the Eighth Amendment, noting correctional officers have limited choices when an inmate refuses an order. *Caldwell*, 968 F.2d at 602. Other circuits have ruled likewise. *See, e.g., Jasper v. Thalacker*, 999 F.2d 353, 354 (8th Cir. 1993) (using stun gun to subdue an unruly inmate); *Michenfelder v. Sumner*, 860 F.2d 328, 335-36 (9th Cir. 1988) (allowing use of stun gun on inmate who refused to submit to a strip search); *Hunter v. Young*, 238 Fed. Appx. 336, 2007 WL 1678060 (10th Cir. June 12, 2007) (unpublished) (affirming use of Taser on a physically impaired detainee who failed to comply with orders); *Henderson v. Gordineer*, No. 3:06-1425, 2007 WL 840273, at *7 (D.S.C. March 14, 2007) (unpublished) (single Taser shot not excessive given prisoner's admission to snatching pills and failure to obey the officer's orders); *Dye v. Lomen*, 40 Fed. Appx. 993, 2002 WL 1585903 (7th Cir. 2002) (unpublished) (use of a Taser on disobedient inmate did not violate the Eighth Amendment).

Yet, other courts have been more stringent concerning the use of Tasers. In *Hickey v. Reeder*, 12 F.3d 754 (8th Cir. 1993), the Eighth Circuit found unconstitutional the use of a stun gun on an inmate who

refused to clean his cell despite the fact that the inmate was neither a danger to himself or others. *Hickey*, 12 F.3d at 756; *accord Orem v. Rephann*, 523 F.3d 442, 446-47 (4th Cir. 2008); *Vasquez v. Raemisch*, 480 F. Supp. 1120, 1133 (W.D. Wis. 2007) (use of Taser unreasonable where inmate was obnoxious and talking during a search); *Preston v. Pavlushkin*, No. 03-CV-00617-RPM, 2006 WL 686481 (D. Colo. 2006) (unpublished) (use of Taser to force inmate to clean up food tray violated Eighth Amendment). Given the aforementioned conflicts and lack of clearly established case law, the Seventh Circuit's denial of qualified immunity for Petitioner should be corrected by this Court.

CONCLUSION

For the foregoing reasons, Petitioner Michael Shreffler respectfully submits that the Petition for a *Writ of Certiorari* should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT FILED SEPTEMBER 4, 2009

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 08-2960

DARRYL L. LEWIS,

Plaintiff-Appellant,

v.

MICHAEL D. DOWNEY, TODD SCHLOENDORF, MICHAEL SHREFFLER, JEAN FLAGEOLE, MIGUEL AYALA, and KANKAKEE COUNTY,

Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois.
No. 06 C 02091 —
David G. Bernthal, *Magistrate Judge*

ARGUED MARCH 30, 2009—DECIDED SEPTEMBER 4, 2009

Before KANNE, WOOD, and WILLIAMS, *Circuit Judges.*

KANNE, *Circuit Judge.* Darryl Lewis was a federal prisoner in custody at a county jail facility in northern Illinois. Lewis filed a civil action pursuant to 42 U.S.C.

§ 1983 after jail officials shot him with a taser gun when he failed to comply with an order to rise from his bed. Lewis claimed the taser shot constituted cruel and unusual punishment in violation of the Eighth Amendment. He also attempted to present a Fourteenth Amendment claim arising from his placement in segregation without the benefit of a hearing. The district court dismissed Miguel Ayala, for lack of personal involvement, and we affirm that dismissal. Further, the district court granted summary judgment in favor of all other defendants. Darryl Lewis did not challenge on appeal the entry of summary judgment in favor of defendants Michael D. Downey, Todd Schloendorf, Jean Flageole and Kankakee County. The grant of summary judgment in favor of those defendants is affirmed. However, as to the remaining defendant pursued in this appeal, we are obligated to accept Lewis's version of events, and we vacate the grant of summary judgment in favor of Michael Shreffler and remand that portion of this case for further proceedings.

I. Background

In November 2005, a federal jury found Lewis guilty of being a felon in possession of a firearm. While awaiting sentencing and the entry of final judgment, Lewis was held in the Jerome Combs Detention Center, a county jail facility in Kankakee County, Illinois.[1] On January

1. Due to a significant and unfortunate lack of federal pretrial detention housing throughout the United States, it is not unusual for federal prisoners awaiting trial or sentencing (Cont'd)

26, 2006, Lewis engaged in a physical altercation with another inmate. Guard Todd Schloendorf entered the cell block, restrained Lewis, and placed him in segregation in the jail's maximum security area. According to Lewis, he was never given any type of hearing regarding his stay in segregation. The next day, Lewis began a hunger strike during which he refused to eat the jail's three daily meals. He continued the hunger strike for approximately twenty days, ending around February 15.

February 6 was Lewis's eleventh day of fasting. That morning, he rang the intercom in his cell and requested medical assistance because he was not feeling well. The officer responding to the call denied Lewis's request, asserting that Lewis had recently refused medical treatment. Lewis, who had previously received a bottle of Motrin-brand ibuprofen tablets from the nurse, held the bottle up to the security camera and told the officer over the intercom that he would "take care of my pain myself." In anger, he threw the bottle to the floor, and the pills and bottle scattered around his cell and under his bunk. Lewis then claims he became dizzy and tired. He laid down. Several minutes later, three guards—

(Cont'd)

to be held in county jail facilities. *See* 18 U.S.C. § 4002 (empowering the Attorney General to contract with states or their political subdivisions "for the imprisonment, subsistence, care, and proper employment" of federal prisoners).

defendants Michael Shreffler[2] and Miguel Ayala and non-party Marlin Woods—entered Lewis's cell. Shreffler ordered Lewis off the bed.

The parties dispute the events that followed. According to Lewis, he was weak from the hunger strike and sick from ingesting Motrin, rendering him sluggish and unable to respond quickly to Shreffler's directive. Instead of standing, Lewis says that he turned his head toward the officers, and before he could explain his failure to comply and without further warning or provocation, Shreffler shot him in the leg with a taser gun. Lewis asserts that the shock from the taser lasted several seconds and caused him to slide to the floor. The officers then handcuffed Lewis, took him from the cell, and cleaned up the scattered pills.

Shreffler, Ayala, and Woods each filed an affidavit. According to their version of events, they entered the cell in response to Lewis's threat to take an overdose of Motrin, which jail officials viewed as a suicide threat. Once inside, the officers claim that Shreffler ordered Lewis to lie on the floor with his hands behind his back so that they could handcuff him, an order that Shreffler repeated at least three times. Lewis refused each of these orders, cursing and yelling at the officers. It was then that Woods, the group's ranking member, ordered

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2. Throughout the record below, and the filings with this court, this defendant-appellee, has alternately been referred to as Michael Shreffler or Schreffler. For the sake of consistency, we will use the spelling as it appears in the district court's order of summary judgment: Michael Shreffler.

Shreffler to shoot Lewis with the taser, which he did. The officers removed Lewis from the cell and cleaned up the pills.

Acting *pro se*, Lewis filed a civil action pursuant to 42 U.S.C. § 1983.[3] The complaint contained two allegations relevant to this appeal. First, Lewis alleged that Shreffler and Ayala violated Lewis's Eighth Amendment right to be free of cruel and unusual punishment by shooting him with the taser. Second,

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3. An interesting question not presented by either party is the applicability of § 1983 to employees of a local correctional facility that is housing federal inmates under contract between the federal and local governments. *See* 18 U.S.C. § 4002. A county employee caring for federal prisoners arguably becomes a *federal* actor, rather than the requisite *state* actor, rendering § 1983 inapplicable. *See* 42 U.S.C. § 1983; *cf. Wilkinson v. Dotson*, 544 U.S. 74, 87, 125 S. Ct. 1242, 161 L. Ed. 2d 253 (2005) (Scalia, J., concurring) (noting, in a different context, that federal prisoners whose custodians are not acting under color of state law cannot sue pursuant to § 1983); *Sandoval v. Wackenhut Corr. Corp.*, No. 93-8582, 1994 U.S. App. LEXIS 10515, 1994 WL 171703, at *2 n.3 (5th Cir. Apr. 28, 1994) (recognizing that employees of a privately run correctional facility operated under contract with the federal government were not state actors for purposes of § 1983). Because it is not currently before us, we reserve our answer to the question for another day. We doubt, however, that the contractual relationship does anything to change the status of county jail employees as *state* actors. *Cf. Logue v. United States*, 412 U.S. 521, 528-32, 93 S. Ct. 2215, 37 L. Ed. 2d 121 (1973) (declining, for purposes of federal government liability under the Federal Tort Claims Act, to characterize as federal employees county jailers who were caring for federal prisoners).

Lewis averred that Officer Schloendorf ran afoul of the Fourteenth Amendment by placing him in segregation without a hearing.

The defendants filed a motion for summary judgment, which a federal magistrate judge granted on July 2, 2008.[4] In pertinent part, the magistrate judge found "that the force applied to Plaintiff was done in a good faith effort to maintain discipline and jail security and not to maliciously or sadistically cause harm to Plaintiff." The court further held that the taser was a *de minimis* use of force that did not implicate Eighth Amendment concerns. The court also dismissed Officer Ayala as a party to the lawsuit, stating that "he lacked any personal involvement in the February 6, 2006, incident." The court did not address Lewis's due process claim arising from his placement in segregation without a hearing.

II. Analysis

On appeal, Lewis contends that the magistrate judge erred by (1) dismissing Officer Ayala from the lawsuit; (2) granting the defendants' motion for summary judgment on his Eighth Amendment claim; and (3) refusing to address his Fourteenth Amendment claim.

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4. Lewis filed his original action in the United States District Court for the Northern District of Illinois. The case was later transferred to the Central District of Illinois, where Kankakee County is located, after which the parties consented to proceed before a magistrate judge. *See* Fed. R. Civ. P. 73.

Appendix A

A. Officer Ayala's Dismissal from the Lawsuit

In their motion for summary judgment, the defendants argued that the court should dismiss Officer Ayala from the suit due to his lack of personal involvement in the events surrounding the February 6 taser shot. The magistrate judge agreed and dismissed Ayala, a decision Lewis now claims was in error.

It is uncontested that Ayala played no direct role in the taser incident. Officer Shreffler fired the taser at the command of his superior officer, Corporal Woods. Even as a bystander, however, Ayala can be held liable under § 1983 if Lewis can show that Ayala (1) had reason to know that a fellow officer was using excessive force or committing a constitutional violation, and (2) had a realistic opportunity to intervene to prevent the act from occurring. *See Chavez v. Ill. State Police*, 251 F.3d 612, 652 (7th Cir. 2001); *see also Harper v. Albert*, 400 F.3d 1052, 1064 (7th Cir. 2005).

According to Lewis's version of events, which, as we will discuss below, we must accept as true on a motion for summary judgment, *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."), Ayala did not have a realistic opportunity to stop Shreffler from discharging the taser gun. In his deposition, Lewis discussed at length how quickly Shreffler shot him with the taser after ordering him off the bed. Lewis said that the shot came "[b]efore I could

say I can't get up." Even assuming Lewis was as sluggish as he claims, if the time between the order and the shot was so brief that Lewis could not respond, we decline to hold Officer Ayala liable for failing to respond as well. Ayala's dismissal from the lawsuit was appropriate.

B. Lewis's Excessive Force Claim

Turning next to Lewis's excessive force claim, we review *de novo* the district court's decision to grant summary judgment. *See Outlaw v. Newkirk*, 259 F.3d 833, 836 (7th Cir. 2001). Summary judgment is appropriate if, after resolving all disputed facts and drawing all reasonable inferences in favor of Lewis, the nonmoving party, there remains no genuine issue of material fact. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *see also Anderson*, 477 U.S. at 248 (stating that summary judgment is precluded "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party").

Lewis filed suit pursuant to 42 U.S.C. § 1983, which provides that a person may not be deprived of any constitutional right by an individual acting under color of state law. The act authorizes claimants to sue persons in their individual capacities who are alleged to have violated such rights. *See Lekas v. Briley*, 405 F.3d 602, 606 (7th Cir. 2005) ("[A § 1983] plaintiff must allege that the defendants deprived him of a right secured by the Constitution or laws of the United States, and that the defendants acted under color of state law." (quotations

omitted)); *see also* 42 U.S.C. § 1983; *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980).

Lewis's claim on appeal is that Shreffler[5] applied excessive force when he shot Lewis with a taser gun, thereby violating the Eighth Amendment's prohibition on cruel and unusual punishment. Before addressing that question, however, we consider the Eighth Amendment's applicability to someone in Lewis's position, i.e., a person found guilty but awaiting sentencing and final judgment.

1. The Eighth Amendment's Applicability to Pre-Sentencing Detainees

Although the Supreme Court has not provided a definitive answer, we doubt that the Eighth Amendment was the proper vehicle for Lewis's suit. As we will explain, it is unlikely that Lewis, who was awaiting sentencing and the entry of final judgment, had yet accrued Eighth Amendment protections. Instead, Lewis's claims should have been framed in terms of the Fourteenth Amendment's Due Process Clause.

The scope of an individual's right to be free from punishment—and, derivatively, the basis for an excessive force action brought under § 1983—hinges on his status

5. Officers Ayala and Woods entered Lewis's cell with Shreffler. We have approved Ayala's dismissal from the suit, and Lewis did not name Woods as a defendant, leaving Shreffler as the only remaining defendant on appeal of Lewis's excessive force claim.

within the criminal justice system. *See Brown v. Budz*, 398 F.3d 904, 910 (7th Cir. 2005). On one end of the spectrum are sentenced prisoners. The Eighth Amendment protects these individuals only from the infliction of cruel and unusual punishment, which is often defined in the prison context as the "'unnecessary and wanton infliction of pain.'" *Wilson v. Williams*, 83 F.3d 870, 875 (7th Cir. 1996) (quoting *Whitley v. Albers*, 475 U.S. 312, 319, 106 S. Ct. 1078, 89 L. Ed. 2d 251 (1986)).

Pretrial detainees, by contrast, have not been convicted or sentenced and thus are not yet "punishable" under the law. *See Bell v. Wolfish*, 441 U.S. 520, 535, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) ("[A pretrial] detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."). This means that pretrial detainees "may not be 'punished' by the state *in any way.*" *Wilson*, 83 F.3d at 875 (emphasis added). As such, pretrial detainees couch excessive force claims as violations of their Fourteenth Amendment rights to due process, not infringements on the Eighth Amendment's ban on cruel and unusual punishment. *See Brown*, 398 F.3d at 910; *Butera v. Cottey*, 285 F.3d 601, 605 (7th Cir. 2002); *Pardue ex rel. Estate of Cole v. Fromm*, 94 F.3d 254, 259 n.1 (7th Cir. 1996).

In some contexts, such as claims of deliberate indifference to medical needs, the Eighth and Fourteenth Amendment standards are essentially interchangeable. *See, e.g., Williams v. Rodriguez*, 509 F.3d 392, 401 (7th Cir. 2007); *Guzman v. Sheahan*, 495 F.3d 852, 856-57 (7th Cir. 2007); *Whiting v. Marathon*

County Sheriff's Dep't, 382 F.3d 700, 703 (7th Cir. 2004). But the distinction between the two constitutional protections assumes some importance for excessive force claims because the Due Process Clause, which prohibits all "punishment," affords broader protection than the Eighth Amendment's protection against only punishment that is "cruel and unusual." *See Wilson*, 83 F.3d at 875 (noting that the Fourteenth Amendment's protection "necessarily extends beyond the prohibition of merely 'cruel and unusual' punishment," resulting in "a higher standard [of protection] than that provided by the Eighth Amendment"); *see also Anderson v. Gutschenritter*, 836 F.2d 346, 349 (7th Cir. 1988). Although the exact contours of any additional safeguards remain undefined, *see Wilson*, 83 F.3d at 875, it is nonetheless important that we identify the appropriate source of Lewis's constitutional protection against the use of excessive force, *see Graham v. Connor*, 490 U.S. 386, 394, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) (noting that analysis of excessive force claims brought pursuant to § 1983 "begins by identifying the specific constitutional right allegedly infringed").

At the time of relevant events, Lewis was neither a pretrial detainee nor a sentenced prisoner. He had been found guilty in a federal court and was in a county jail awaiting sentencing and the entry of final judgment. The question is whether a person in this purgatory within our criminal justice system is cloaked with the Eighth Amendment's limited safeguards against only "cruel and unusual" punishment or the Fourteenth Amendment's broader protections against punishment "in any way." *See Wilson*, 83 F.3d at 875.

The Supreme Court has not directly addressed whether the Eighth Amendment is applicable to *presentencing* detainees, but it has indicated that the answer is no. According to the Court, "the State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law." *Ingraham v. Wright*, 430 U.S. 651, 671 n.40, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977). The Court later confirmed that such a "formal adjudication" includes both conviction and sentence. *Graham*, 490 U.S. at 392 n.6 (noting that *Ingraham* established that "the Eighth Amendment's protections did not attach until after conviction *and sentence*" (emphasis added)); *see also Anderson*, 836 F.2d at 348 ("The Eighth Amendment . . . is applicable only to those criminals who are serving a sentence."); *Bailey v. Andrews*, 811 F.2d 366, 373 (7th Cir. 1987) ("[T]he eighth amendment right . . . is applicable only to sentenced criminals.").

This would mean that Eighth Amendment rights had not yet vested in Lewis, who had not been sentenced. Absent Eighth Amendment protections, his status would be analogous to that of a pretrial detainee, meaning that the basis for his § 1983 action should have been the Fourteenth Amendment Due Process Clause. *See Butera*, 285 F.3d at 605; *Pardue ex rel. Estate of Cole*, 94 F.3d at 259 n.1.

The problem is that Lewis, acting *pro se*, alleged violations of only the Eighth Amendment, a line of argument that his appointed counsel maintains on

appeal. Further complicating the issue is that defendants have not objected to the improper basis for Lewis's action—a calculated move perhaps, given that Lewis is seeking more limited protection than he might otherwise deserve. *Cf. Blake v. Katter*, 693 F.2d 677, 682-83 (7th Cir. 1982) (liberally construing *pro se* complaint and remanding when district court, acting on defendant's motion, dismissed action for improperly seeking redress under the Eighth Amendment), *overruled on other grounds by Wilson v. Garcia*, 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985).

As we have made clear, anything that would violate the Eighth Amendment would also violate the Fourteenth Amendment. *See City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244, 103 S. Ct. 2979, 77 L. Ed. 2d 605 (1983) ("[T]he due process rights of a person . . . are at least as great as the Eighth Amendment protections . . . ."); *Wilson*, 83 F.3d at 875. Thus, we conclude that although we must evaluate Lewis's claims under what we believe is the proper basis—here, the Fourteenth Amendment—we will do so only insofar as the alleged conduct would have violated the Eighth Amendment as well; we will not consider any safeguards the Fourteenth Amendment provides beyond those it shares with the Eighth Amendment. Lewis has argued only for these more limited protections. *See Pardue ex rel. Estate of Cole*, 94 F.3d at 259 n.1 (finding claim of broader Fourteenth Amendment rights forfeited when plaintiff sought redress only under Eighth Amendment standard). With that understanding, we turn now to Lewis's claims.

2. Use of a Taser Gun to Compel Compliance

The "unnecessary and wanton infliction of pain" on a prisoner violates his rights under the Eighth Amendment. *Whitley v. Albers*, 475 U.S. 312, 319, 106 S. Ct. 1078, 89 L. Ed. 2d 251 (1986) (quotations omitted); *see also Hudson v. McMillian*, 503 U.S. 1, 5, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992). But not every "malevolent touch" by a security officer implicates the Constitution. *Hudson*, 503 U.S. at 9. The use of *de minimis* force, so long as it "is not of a sort repugnant to the conscience of mankind," is not of Eighth Amendment concern. *Id.* at 9-10 (quotations omitted). If the force were more than *de minimis*, we must consider whether it "was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Id.* at 7.

a. Taser Gun: De Minimis *Application of Force*

As one basis for his decision, the magistrate judge found that the use of the taser gun was a *de minimis* application of force. We disagree. It is undisputed that the taser sent an electric shock through Lewis's body strong enough to cause him to fall from the bed and render him helpless while officers secured him and removed him from the cell.

As the Supreme Court has said, pain, not injury, is the barometer by which we measure claims of excessive force, *see id.* at 9, and one need not have personally endured a taser jolt to know the pain that must

accompany it, *see Hickey v. Reeder*, 12 F.3d 754, 757 (8th Cir. 1993) ("[A] stun gun inflicts a painful and frightening blow [that] temporarily paralyzes the large muscles of the body, rendering the victim helpless."); *see also Matta-Ballesteros v. Henman*, 896 F.2d 255, 256 n.2 (7th Cir. 1990) (noting that a taser "sends an electric pulse through the body of the victim causing immobilization, disorientation, loss of balance, and weakness"). Thus, we hold, as the first rung in the ladder of our analysis, that the use of a taser gun against a prisoner is more than a *de minimis* application of force.

Although such force against an inmate rises above the inconsequential and into the constitutional realm, we reiterate an obvious point: simply because a taser gun's use is more than *de minimis* force does little, if anything, to alter its *appropriate* use within our detention system. *See Hickey*, 12 F.3d at 757 (finding a taser's use more than *de minimis* only "*if inflicted without legitimate reason*" (emphasis added)). We remain cognizant of the important role that non-lethal, hands-off means—including taser guns—play in maintaining discipline and order within detention facilities. *See Soto v. Dickey*, 744 F.2d 1260, 1267-70 (7th Cir. 1984).

Our conclusion merely shifts the focus of our inquiry away from the act and to the actor, away from the objective and to the subjective. *See Hudson*, 503 U.S. at 8 (distinguishing between the objective question of whether an act is "harmful enough" and the subjective question of whether an actor possessed a culpable state

of mind); *Hickey*, 12 F.3d at 756-57. What matters—and what will generally be the decisive factor in cases such as this—is the mindset of the individual applying the force. That is the question to which we now turn.

b. Officer Shreffler's State of Mind

As we stated above, only the "unnecessary and wanton infliction of pain" violates a prisoner's rights under the Eighth Amendment. *Whitley*, 475 U.S. at 319 (quotations omitted). The Constitution is not offended when force is used "in a good-faith effort to maintain or restore discipline." *Hudson*, 503 U.S. at 7. Non-*de minimis* force runs afoul of the Eighth Amendment only when it is intended "maliciously and sadistically to cause harm." *Id.*

The court below could have rested the grant of summary judgment on its finding of *de minimis* force alone, *see id.* at 9-10 (excluding from "constitutional recognition" the application of *de minimis* physical force), but the magistrate judge, as an alternative basis, found that Officer Shreffler used the taser gun "in a good faith effort to maintain discipline and jail security and not to maliciously or sadistically cause harm to Plaintiff." Resolving, as we must, disputed facts in Lewis's favor, we cannot agree.

Lewis argues that the use of the taser gun was without penological purpose and was therefore *per se* malicious. *See Fillmore v. Page*, 358 F.3d 496, 504 (7th Cir. 2004) (noting that the infliction of pain is *per se*

malicious if it is done "'totally without penological justification'" (quoting *Hope v. Pelzer*, 536 U.S. 730, 737, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002))). On the contradictory record before us, we cannot conclude, as a matter of law, that Shreffler's actions were without penological justification. Such a determination rests upon disputed questions of fact that should be left to the jury to resolve.

Jails are dangerous places, and it is without rational dispute that security officials are justified in maintaining decorum and discipline among inmates to minimize risks to themselves and other prisoners. *See Bell*, 441 U.S. at 546 ("[M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees."); *Soto*, 744 F.2d at 1269 (according prison officials wide-ranging deference to adopt and execute policies "needed to preserve internal order and discipline"). We have previously discussed how important it is that prisoners follow orders:

> Orders given must be obeyed. Inmates cannot be permitted to decide which orders they will obey, and when they will obey them. . . . Inmates are and must be required to obey orders. When an inmate refuse[s] to obey a proper order, he is attempting to assert his authority over a portion of the institution and its officials. Such refusal and denial of authority places the staff and other inmates in danger.

Soto, 744 F.2d at 1267; *see also Colon v. Schneider*, 899 F.2d 660, 668-69 (7th Cir. 1990).

In many circumstances—often when faced with aggression, disruption, or physical threat—compelling compliance with an order is a valid penological justification for use of a taser. *See Hickey*, 12 F.3d at 759 (recognizing that prison officials "may compel compliance with legitimate prison regulations" through the use of summary physical force). But such justification does not necessarily exist every time an inmate is slow to comply with an order. *See Treats v. Morgan*, 308 F.3d 868, 873 (8th Cir. 2002) ("Not every instance of inmate resistance justifies the use of force . . . ."). What must be decided in each case, and the issue to which we next turn, is whether the facts surrounding the taser's deployment—as Lewis portrays them—demonstrated actual malice or sadistic purpose on the part of the user.

Several factors are relevant in determining whether a defendant applied force in good faith or for purposes of causing harm, including the need for force, the amount of force used, the threat reasonably perceived by the officer, efforts made to temper the severity of the force, and the extent of the injury caused by the force. *Fillmore*, 358 F.3d at 504; *see also Whitley*, 475 U.S. at 321. The exact sequence of events leading to the taser's use in this case is strongly disputed, but we are required to view the facts in the light most favorable to Lewis. *Anderson*, 477 U.S. at 255. Doing so, we conclude that Lewis has raised a genuine issue of material fact regarding Shreffler's mental state at the

time he discharged the taser, thereby precluding summary judgment.

In cases upholding the use of taser guns, the victims have been violent, aggressive, confrontational, unruly, or presented an immediate risk of danger to themselves or others. Such behavior certainly increases the need for force and often poses a threat to the security officers. In *Jasper v. Thalacker*, 999 F.2d 353 (8th Cir. 1993), for example, a prisoner verbally threatened a guard, clenched his fists, and then lunged at the guard. *Id.* at 354. The Eighth Circuit condoned the use of a taser to subdue the inmate. *Id.* Similarly, in *Caldwell v. Moore*, 968 F.2d 595 (6th Cir. 1992), the Sixth Circuit upheld the use of a stun gun against an inmate who became aggressive and confrontational when his requests to be let out of his isolation cell were denied. *Id.* at 596-97, 602. For seven hours, he shouted at the jailer and kicked the cell door, persisting in this behavior despite warnings that he would be forced to comply if he did not calm down. *Id.* at 597. The Tenth Circuit, in an unpublished decision, also approved the use of a taser to force compliance with an order given moments after the prisoner had engaged in a physical altercation with security officers. *Hunter v. Young*, 238 F. App'x 336, 339 (10th Cir. 2007). Finally, this court has previously upheld the use of a stun gun to calm a prisoner who was banging his head against his concrete bed and struggling against the guards who were attempting to restrain him. *Dye v. Lomen*, 40 F. App'x 993, 995-96 (7th Cir. 2002).

Appendix A

Similar examples of aggressive or threatening behavior are noticeably absent from Lewis's version of events. At the time he was shot, Lewis asserts that he was merely lying on his bunk, weak and sluggish from more than ten days without food, when Shreffler ordered him to get up. Lewis claims that he said nothing and had time only to turn his head toward the doorway before Shreffler shot him with the taser. In Lewis's story, he was given a single order that was not repeated or accompanied by any warning that his failure to comply would result in use of the taser.

Looking at the sequence of events as alleged by Lewis, we find several facts troubling: the absence of any agitation or threat from Lewis; the short passage of time between Shreffler's order and the taser shot; Shreffler's single, unrepeated order; and the dearth of warnings regarding the consequences of Lewis's failure to comply.

We do not intend to mandate a checklist that detention officers must follow before they may constitutionally employ a taser. As we have said, we entrust officers with the discretion to act appropriately in light of the circumstances confronting them. In a jail or prison setting, it is not hard to imagine any number of scenarios that would justify the immediate and unadvertised use of summary force, including taser guns.

But, *based on Lewis's facts*, we cannot say that Shreffler acted in good faith. Nor can we say that he

acted maliciously or wantonly. Our only conclusion is that if we accept as true Lewis's version of the events surrounding the taser shot, he has raised a genuine issue of material fact regarding Officer Shreffler's state of mind when Shreffler fired the taser gun. That is enough to preclude summary judgment. What he will be able to prove at trial is a different question altogether, but Lewis has presented enough here that if the jury accepted his story, it could find in his favor. That is all we require. *See Anderson*, 477 U.S. at 248 (stating that summary judgment is precluded "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party").

3. Qualified Immunity

Shreffler's only remaining basis to support summary judgment is through the protection of qualified immunity, an argument that he presented in his motion to the magistrate judge. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). The magistrate judge decided the case on other grounds and did not reach the immunity question. We consider it now and conclude that Officer Shreffler is not immune from potential liability.

To defeat a defense of qualified immunity, Lewis must demonstrate (1) that the guard's conduct violated his constitutional rights, and (2) that the violated right was clearly established at the time of the alleged misconduct. *See Siegert v. Gilley*, 500 U.S. 226, 232, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991); *see also Harlow*,

457 U.S. at 818; *Payne v. Pauley*, 337 F.3d 767, 775 (7th Cir. 2003). As should be clear from the preceding discussion, the answer to the first part of this test hinges on the resolution of fact questions that are now in the jury's hands. *See Hill v. Shelander*, 992 F.2d 714, 717-18 (7th Cir. 1993). Thus, we can dismiss the case on summary judgment only if we find that the right that Shreffler allegedly violated was not clearly established at the time of the purported misconduct. *See id.* at 718. This is a question of law. *Marshall v. Allen*, 984 F.2d 787, 793 (7th Cir. 1993) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)).

To remove from Shreffler the shield of qualified immunity, the right that he allegedly violated must be clearly established "'in a particularized sense.'" *Hill*, 992 F.2d at 718 (quoting *Juriss v. McGowan*, 957 F.2d 345, 350 (7th Cir. 1992)). This does not mean that the "very action in question" must have previously been held unlawful. *Juriss*, 957 F.2d at 350 (quotations omitted). Instead, we must determine whether, operating under the state of the law as it existed at the time of relevant events, "a reasonable officer would have known that the particular action at issue . . . was unlawful." *Id.*; *see also Hope*, 536 U.S. at 739 (stating that the contours of a constitutional right "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right" (quotations omitted)); *Hill*, 992 F.2d at 718.

We hold that a reasonable officer would understand that employing a taser gun under the version of the

facts that Lewis has described would violate the prisoner's constitutional rights. Our case law makes this clear. In *Soto*, 744 F.2d 1260, for example, a case the defendants cite at length, we approved the use of chemical agents, including mace and tear gas, "when reasonably necessary to prevent riots or escape or to subdue recalcitrant prisoners." *Id.* at 1270. We also said that similar means were appropriate in other circumstances, such as compelling compliance with orders, but we cautioned that such force could not be "exaggerated or excessive" and should generally follow "adequate warning[s]." *Id.* at 1270-71. Similarly, in *Dye*, 40 F. App'x 993, we upheld a stun gun's use to subdue a struggling prisoner who was risking injury to himself and others. *Id.* at 996.

Lewis claims that he was prone on his bed, weakened, and docile. He asserts that he was told to rise one time and was not warned that a taser would be used against him if he failed to comply. He states that he was scarcely given enough time to turn his head and did not otherwise respond to Shreffler's order. If these truly are the facts, no reasonable officer would think that he would be justified in shooting Lewis with a taser gun. Accepting Lewis's story, we conclude that Officer Shreffler is not entitled to qualified immunity.

C. Fourteenth Amendment Right to a Hearing Before Being Placed in Segregation

Lewis's final argument is that the magistrate judge erred by failing to address his Fourteenth Amendment Due Process claim that arose from his placement in segregation without a hearing. We hold that because the claim was not properly before the magistrate judge, he was correct not to address it, and we decline to address the claim as well.

Section 1915A of Title 28 of the United States Code establishes a screening procedure by which a district court evaluates prisoner civil rights claims for purposes of identifying those that have arguable merit. It provides that a district court "shall review . . . a complaint in a civil action in which a prisoner seeks redress from a governmental . . . officer or employee." 28 U.S.C. § 1915A(a). After conducting this review, the court "shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if [it] is frivolous . . . or fails to state a claim upon which relief maybe granted." *Id.* § 1915A(b)(1).

In its local rules, the Central District of Illinois has specified the procedure that it uses to conduct the § 1915A screening. *See* Fed. R. Civ. P. 83(a)(1) (empowering district courts to enact local rules that are consistent

with federal law and rules of practice). The relevant local rule provides as follows:

> If practicable, the Court will conduct a merit review of the complaint before service is ordered, and enter a Case Management Order delineating the viable claims stated, if any. . . . [T]he case shall proceed *solely* on those claims identified in the Case Management Order. *Any claims not defined in the Case Management Order will not be included in the case.* . . .

C.D. Ill. R. 16.3(C) (emphases added). Thus, one method the Central District has established for dismissing unwarranted claims, as required under § 1915A, is to omit them from its case management order. That is what occurred here.

On March 19, 2007, the district court conducted a merit review as provided in Local Rule 16.3. The following day, it issued a case management order that defined the issues that Lewis could pursue in his civil action. The order, to which Lewis never objected, made no mention of Lewis's stay in segregation or the jail's failure to conduct any related hearings. As set forth in Local Rule 16.3, the absence of any such claim in the case management order resulted in its elimination from the case.

When evaluating the defendants' motion for summary judgment, the magistrate judge adhered to

the court's local rules and considered only those claims approved in the case management order. Lewis could not resurrect that claim then, and he cannot resurrect it now. Were we to now consider its merits, we would be disregarding the integrity of the system established by the district court. This we decline to do.

III. Conclusion

We AFFIRM the magistrate judge's dismissal of Miguel Ayala as a party to the lawsuit. Darryl Lewis did not challenge on appeal the entry of summary judgment in favor of Michael D. Downey, Todd Schloendorf, Jean Flageole, and Kankakee County, and that portion of the summary judgment is AFFIRMED. However, as to Michael Shreffler, the remaining defendant that was pursued in this appeal, we VACATE the grant of summary judgment in his favor and REMAND that portion of this case for further proceedings. Finally, we decline to consider the merits of Lewis's due process argument. It is not properly before us.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS FILED JULY 2, 2008

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

No. 06-2091

DARRYL LESTER LEWIS,

Plaintiff,

v.

MICHAEL D. DOWNEY, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiff, Darryl L. Lewis, has filed a pro se complaint pursuant to 42 U.S.C. § 1983 against Defendants, the County of Kankakee, Kankakee County Chief of Corrections Michael Downey, Correctional Officers Todd Schloendorf, Michael Shreffler, Miguel Ayala, and Nurse Jean Flageole. Plaintiff seeks money damages for constitutional injuries that he allegedly incurred while detained at the Jerome Combs Detention Center (hereinafter "JCDC"). Specifically, Plaintiff

alleged that Defendant Todd Schloendorf, in his individual capacity, used excessive force on Plaintiff on January 26, 2006; that Defendants Miguel Ayala and Michael Shreffler, in their individual capacities, used excessive force on Plaintiff on February 6, 2006; that Nurse Jean Flageole, in her individual capacity, was deliberately indifferent to Plaintiff s serious medical needs on October 22, 2005, January 3, 2006, and February 5, 9, and 14, 2006; and that Defendants Kankakee County and Chief Michael Downey, in his official capacity, condoned such alleged constitutional violations. Before the court are the Defendants' summary judgment motion [87], the Plaintiff's response [95][1] and the Defendants' reply [101].

Standard

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled

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1. The defendants filed their summary judgment motion on November 30, 2007. On December 3, 2007, a notice was mailed to the plaintiff advising him that he had 21 days to respond to the summary judgment motion [90]. On December 21, 2007, the plaintiff filed a motion for extension of time to respond to the pending summary judgment motion [94], but also filed a response [95] that same day. Nevertheless, the court allowed the plaintiff up and until January 24, 2008 to file a response. The plaintiff did not file a response. Therefore, the court considers only the plaintiff's December 21, 2007 response [95] in rendering its decision.

to judgment as a matter of law." Fed. R. Civ. P. 56(c). Any discrepancies in the factual record should be evaluated in the nonmovant's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) *(citing Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)). The party moving for summary judgment must show the lack of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248.

"Summary judgment is the 'put up or shut up' moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events. *Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 901 (7th Cir. 2000). A party opposing summary judgment bears the burden to respond, not simply by resting on its own pleading but by "set[ting] out specific facts showing a genuine issue for trial." *See* Fed. R. Civ. P. 56(e). In order to be a "genuine" issue, there must be more than "some metaphysical doubt as to the material facts." *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "If [the nonmovant] does not [meet his burden], summary judgment should, if appropriate, be entered against [the nonmovant]." Fed. R. Civ. P. 56(e).

Affidavits must be based on the personal knowledge of the affiant and "set out *facts* that would be admissible in evidence." Fed. R. Civ. P. 56(e) (emphasis added). Personal knowledge may include inferences and opinions

drawn from those facts. *Visser v. Packer Eng. Assoc., Inc.*, 924 F.2d 655, 659 (7th Cir. 1991). "But the inferences and opinions must be grounded in observation or other first-hand personal experience. They must not be based on flights of fancy, speculations, hunches, intuitions or rumors remote from that experience." *Visser*, 924 F.2d at 659.

Undisputed Material Facts[2]

1. At all times relevant to Plaintiff's Complaint, pro se Plaintiff Darryl L. Lewis was incarcerated at the Kankakee County Jerome Combs Detention Center ("JCDC") (Def. Answer Pl. Compl., attached as Exhibit A).

2. At all time relevant to the Plaintiffs complaint, Defendant Michael Downey was the JCDC Chief of Corrections, Defendant Jean Flageole was the head nurse, and Defendants Michael Shreffler, Todd Schloendorf, and Miguel Ayala were correctional officers (Ex. A, Defs. Answer Pl. Compl., p. 2 [53]).

3. On September 19, 2005, Plaintiff submitted a sick call slip stating that he had injured his lower back from a fall in the shower (Sick Call Slip, September 19, 2005, attached as Group Exhibit B).

4. On September 20, 2005, Plaintiff was examined by JCDC certified physician's assistant, Kristy

2. Exhibits can be found at document [89].

Patterson, who prescribed Flexiril, Motrin and ice packs (Lewis Dep., pp. 68-69, attached as Exhibit C; Flageole Aff. ¶ 2, attached as Exhibit D; Medical Recs., September 20, 2005, attached as Group Exhibit E).

5. On September 27, 2005, Patterson examined Plaintiff again and continued the prescription for Motrin and Flexiril, and also prescribed warm packs and back exercises (Ex. D, Flageole Aff. ¶ 2; Group Exhibit E, Medical Recs., September 27, 2005).

6. On October 21, 2005, Plaintiff submitted a sick call slip stating that he was moved to a top bunk and that his lower back pains persisted due to climbing up to the top bunk (Group Ex. 13, Sick Call Slip, October 21, 2005; Ex. C, Lewis Dep., pp. 151-53).

7. On October 22, 2005, Defendant Flageole responded to Plaintiff's sick call slip, stating that the Plaintiff could not have a bottom bunk because the jail doctor had not prescribed it (Ex. D, Flageole Aff. ¶ 4; Group Ex. B, Sick Call Slip, October 21, 2005).

8. It was the policy and practice of the JCDC that unless an inmate presents an obvious debilitating condition, such as paralysis, amputations, or seizures, only physicians or physician's assistants may prescribe medical orders, such as a bottom bunk permit (Ex. D Nurse Flageole Aff. ¶ 5; Kristy Patterson Aff. ¶ 7, attached as Exhibit F).

9. A lower bunk permit had not been prescribed for Plaintiff by the physician or physician's assistant (Ex. C, Lewis Dep., p. 126 ; Ex. D, Flageole Aff. ¶¶ 3, 6; Ex. F, Patterson Aff. ¶ 8).

10. On November 28, 2005, Plaintiff submitted a sick call slip complaining of lower back pain (Group Ex. B, Sick Call Slip, November 29, 2005).

11. On November 29, 2005, Defendant Flageole responded to the sick call slip by advising Lewis that an appointment with the doctor had been made (Group Ex. B, Sick Call Slip, November 29, 2005; Ex. D, Flageole Aff. ¶ 7).

12. On December 1, 2005, Plaintiff refused to be seen by the doctor (Group Ex. E, Medical Recs., December 1, 2005).

13. On December 9, 2005, Plaintiff submitted a grievance to Defendant Downey complaining about lingering back pain, requesting an examination, and stating that he only receives Motrin and Flexiril and ice packs (Grievance December 9, 2005, attached as Group Exhibit G).

14. On December 13, 2005, Plaintiff submitted a sick call slip complaining about lower back pain and requesting medical assistance (Group Ex. B, Sick Call Slip, December 13, 2005).

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15. On December 15, 2005, certified physician's assistant Kristy Patterson examined Plaintiff and found no radiation or radiculopathy, diagnosed lower back pain, ordered an x-ray and referred Plaintiff to physical therapy (Ex. C, Lewis Dep., pp. 130-131; Group Ex. E, Medical Recs., December 15, 2005).

16. On December 16, 2005, Plaintiff submitted a sick call slip requesting something for pain, and he was prescribed Motrin, 200 mg (Group Ex. B, Sick Call Slip, December 16, 2005).

17. On December 20, 2005, Plaintiff's lower back was x-rayed and on December 21, 2005, the scans of these x-rays were reviewed and reported on by radiologists at Provena-St. Mary's Hospital (Ex. C, Lewis Dep., p. 131; Group Ex. E, Radiology Report, December 20, 2005; Ex. F, Patterson Aff. ¶ 12).

18. Kristy Patterson reviewed the radiologists' report regarding Lewis's x-rays (Ex. F, Patterson Aff. ¶ 13).

19. According to the radiologists' report, as well as Patterson's review of their report, Lewis's x-rays disclosed no abnormality to Lewis's lower back (Ex. C, Lewis Dep., p. 131; Group Ex. E, Radiology Report, December 20, 2005; Ex. F, Patterson Aff. ¶¶ 12-13, 15).

20. On December 27, 2005, Plaintiff was referred to Provena-St. Mary's Hospital for physical therapy for treatment of lower back pain (Group Ex. E, Medical Recs., December 27, 2005; Ex. F, Patterson Aff. ¶14).

21. On January 1, 2006, Plaintiff submitted a sick call slip requesting a bottom bunk permit (Ex. C, Lewis Dep., pp. 95-97, 151-53; Group Ex. B, Sick Call Slip, January 1, 2006; Ex. D, Nurse Flageole Aff. ¶ 8).

22. On January 3, 2006, Defendant Flageole denied the bottom bunk request again on the basis that no doctor had ordered it, and because Plaintiff's x-ray was normal and Plaintiff was scheduled for physical therapy (Group Ex. B, Sick Call Slip, January 1, 2006; Ex. D, Flageole Aff. ¶ 9).

23. Plaintiff received physical therapy for his lower back on five occasions between January 4, 2006, and January 20, 2006 (Group Ex. E, Medical Recs., M2-M11; Ex. C, Lewis Dep., p. 132).

24. On January 26, 2006, at approximately 9:30 p.m., Plaintiff got into a verbal and physical altercation with inmate Darwin Brown (Ex. C, Lewis Dep., pp. 160-166; Brinkman Aff. ¶¶ 1-6, attached as Exhibit H).

25. Despite having been sanctioned "quite a few times" for attempting to fight and having been previously involved in an altercation with Darwin Brown, Plaintiff swung at Brown and Brown swung back (Ex. C, Lewis Dep., pp. 162-66; Ex. H, Brinkman Aff. ¶¶ 3, 5).

26. Correctional Officer Adam Brinkman observed the fight and called for officer assistance (Ex. H, Brinkman Aff. ¶¶ 2-6).

27. Brinkman ordered all inmates to lock up (return to their cells) (Ex. C, Lewis Dep., p. 166; Ex. H, Brinkman Aff. ¶ 4).

28. Plaintiff and Brown continued to swing at each other (Ex. C, Lewis Dep., p. 167; Ex. H, Brinkman Aff. ¶¶ 6-7).

29. Plaintiff and Brown were holding each other and trying to take each other to the ground (Ex. C, Lewis Dep., p. 168).

30. Defendant Schloendorf entered the cellblock and grabbed Plaintiff from behind and brought him down to the ground (Ex. C, Lewis Dep., pp. 167-169; Schloendorf Answer Interrog. #4, attached as Exhibit I).

31. On January 26, 2006, Plaintiff submitted a sick call slip stating that an officer had stomped on the back of his knee causing an injury (Group Ex. B, Sick Call Slip, January 26, 2006).

32. On January 27, 2006, Defendant Flageole examined Plaintiff (Ex. C, Lewis Dep., pp. 148-49; Ex. D, Flageole Aff. ¶ 10; Group Ex. E, Medical Recs, January 27, 2006).

33. Plaintiff told Nurse Flageole that the day before he was in a fight, and that he had pain to the back of his left knee and muscle pain "like a pulled muscle" (Ex. C, Lewis Dep., pp. 148-49; Ex. D, Flageole Aff. ¶¶ 10-11; Group Ex. E, Medical Recs., January 27, 2006).

34. Flageole found that Plaintiff exhibited good strength in his left leg, and that there was no edema, discoloration or signs of trauma to or around the left leg or knee (Ex. D, Flageole Aff. ¶ 12; Group Ex. E, Medical Recs., January 27, 2006).

35. Flageole prescribed ice packs and Motrin and told Plaintiff to contact her within a few days if the pain did not subside (Ex. D, Flageole Aff. ¶ 13; Group Ex. E, Medical Recs., January 27, 2006; Ex. C, Lewis Dep., pp. 149-50).

36. On February 2, 2006, Plaintiff refused physical therapy for his lower back (Group Ex. B, Treatment Refusal Form, February 2, 2006).

37. On February 4, 2006, Plaintiff submitted a sick call slip complaining of headaches and dizziness (Group Ex. B, Sick Call Slip, February 4, 2006).

38. On February 5, 2006, Plaintiff refused to be seen by the nurse (Group Ex. B, Sick Call Slip, February 5, 2006; Group Ex. G, Grievance, February 5, 2006; Ex. D, Flageole Aff. ¶ 14).

39. On February 6, 2006, between 9:00 a.m. and 9:30 a.m., Plaintiff pushed the intercom button in his cell and told a correctional officer that he felt bad and asked to see a nurse (Ex. C, Lewis Dep., pp. 151-53, 174-175, 177; Woods Aff., ¶ 4, attached as Exhibit J).

40. Plaintiff had a bottle of Motrin in his cell (Ex. C, Lewis Dep., p. 178; Ex. J, Woods Aff. ¶ 10; Ayala Aff., ¶ 5, attached as Exhibit K; Shreffler Aff., ¶ 5, attached as Exhibit L).

41. Plaintiff told the corrections officer to "forget about it," and then held up the bottle to the security camera and stated that he would take care of the pain himself (Ex. C, Lewis Dep., p. 177, 180).

42. Plaintiff became angry and threw the pills all over the floor (Ex. C, Lewis Dep., pp. 179-180; Ex. J, Woods Aff. ¶ 10; Ex. K, Ayala Aff., ¶ 5, Ex. L, Shreffler Aff., ¶ 5).

43. Defendant Shreffler entered Plaintiff's cell and ordered Plaintiff to get off the bed and to be handcuffed (Ex. C, Lewis Dep., pp. 180-183; Ex. A, Def. Answer Pl. Compl. ¶ 9; Ex. J, Woods Aff. ¶ 11; Ex. K, Ayala Aff., ¶ 6, Ex. L, Shreffler Aff., ¶ 6).

44. Plaintiff was sluggish and remained on the bed and turned his head toward Officer Shreffler (Ex. C, Lewis Dep., p. 182).

45. Shreffler shot Plaintiff in the leg with a tazer gun, because Plaintiff had refused to comply with his order (Ex, C, Lewis Dep., pp. 180, 182; Ex. A, Def. Answer Pl. Compl. ¶ 9; Ex. J, Woods Aff. ¶¶ 9, 11-15; Ex. K, Ayala Aff., ¶¶ 4, 6-8, Ex. L, Shreffler Aff, ¶¶ 4, 6-8).

46. Plaintiff testified that the officers' "only mission was to come get the Motrins from me"; that the officers "had a good reason" to take the pills; and that the only injury incurred was a temporary shocking. (Ex. C, Lewis Dep., pp. 187-88, 192, 199).

47. Plaintiff was handcuffed and removed from the cell (Ex. C, Lewis Dep., p. 185; Ex. A, Def. Answer Pl. Compl. ¶ 10; Ex. J, Woods Aff. ¶15; Ex. K, Ayala Aff., ¶ 8, Ex. L, Shreffler Aff., ¶ 9).

48. The officers cleaned up the pills and returned Plaintiff to his cell (Ex. C, Lewis Dep., pp. 187-189; Ex. J, Woods Aff. ¶ 16; Ex. K, Ayala Aff., ¶ 9, Ex. L, Shreffler Aff., ¶ 10).

49. Other than being shocked, Plaintiff did not incur any injury as a result of the tazer incident (Ex. C, Lewis Dep., p. 192).

50. On February 6, 2006, Plaintiff submitted a sick call slip stating that he was very sick and weak and that he had been tazed for not moving quick enough (Group Ex. B, Sick Call Slip, February 6, 2006).

51. On February 7, 2006, Plaintiff refused a doctor's appointment (Group Ex. E, Medical Recs., Treatment Refusal Form, February 7, 2006).

52. On January 27, 2006, Plaintiff had begun a hunger strike and continued the hunger strike until February 15, 2006 (Ex. C, Lewis Dep., pp. 98-99).

53. Plaintiff went on the hunger strike voluntarily (Ex. C, Lewis Dep., p. 98).

54. Plaintiff was offered three meals a day, but chose not to eat (Ex. C, Lewis Dep., pp. 142, 160).

55. The pain that Plaintiff incurred from his hunger strike was self-inflicted (Ex. C, Lewis Dep., p. 195).

56. On February 8, 2006, Plaintiff submitted a sick call slip stating that he was experiencing dizziness, headaches, weakness and lack of appetite due to his hunger strike (Ex. C, Lewis Dep. p. 100, 151-53; Group Ex. B, Sick Call Slip, February 8, 2006; Ex. D, Flageole Aff. ¶ 15).

57. On February 9, 2006, Defendant Flageole responded to the sick call slip suggesting that

Plaintiff eat to alleviate his hunger symptoms (Ex. C, Lewis Dep. pp. 100-101, 151-53; Group Ex. B, Sick Call Slip, February 8, 2006; Ex. D, Flageole Aff. ¶ 16).

58. On February 12, 2006, Plaintiff submitted a sick call slip complaining about knee and lower back pain and asking to resume physical therapy for his lower back and receive pain relievers for his knee (Group Ex. B, Sick Call Slip, February 12, 2006; Ex. C, Lewis Dep., pp. 199-200; Ex. D, Flageole Aff. ¶ 17).

59. On February 14, 2006, Defendant Flageole responded to the request by directing Plaintiff to order pain relievers from the commissary (Group Ex. B, Sick Call Slip, February 12, 2006; Ex. D, Flageole Aff. ¶ 17; Ex. C, Lewis Dep., pp. 151-53).

60. Plaintiff testified he incurred no new injury, but only that the healing of his lower back and knee were delayed (Ex. C, Lewis Dep., pp. 198-99).

61. The JCDC Inmate Handbook provides for a grievance procedure wherein an inmate is to submit to a member of the Corrections Staff, to be forwarded to the Chief of Corrections, specific information regarding a condition in the jail (JCDC Inmate Handbook, p. 22, attached as Exhibit M).

62. Plaintiff had notice of this procedure and filed grievances during his incarceration at the JCDC (Ex. G, Grievances, Dec. 9, 2005, and Feb. 5, 2006).

63. Plaintiff has not filed any grievances, but only medical requests, regarding the incidents on October 22, 2005, January 1, 2006, and February 5, 9, and 14, 2006 (Ex. C, Lewis Dep. 151-53).

64. Plaintiff sued Defendant Downey only because he is the Chief of Corrections (Ex. C, Lewis Dep., p. 210).

65. There is no evidence of any official policy, custom or practice adopted by Chief of Corrections Michael Downey regarding any of Plaintiff's claims (Ex. C, Lewis Dep., pp. 210-11).

66. Plaintiff sued Kankakee County only because other inmates have sued Kankakee County in the past (Ex. C, Lewis Dep., pp. 211-12).

Discussion and Conclusion

The defendant Kankakee County cannot be held liable for the acts of the sheriff's correctional officers and therefore Kankakee County is entitled to summary judgment. It is well settled that a county cannot be held liable for damages caused by its constitutional officers over whom it has no control. *See Franklin v. Zaruba*, 150 F.3d 682, 685-86 (7th Cir. 1998). In *Moy v. County of Cook*, 159 Ill.2d 519, 640 N.E.2d 926 (Ill. 1994), the Illinois

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Supreme Court affirmed the dismissal of a wrongful death lawsuit filed against Cook County for the actions taken by Cook County Sheriff personnel. *Id.* Despite the fact that sheriffs were labeled "county officers" in the Illinois Constitution and statutes, the court found that Cook County had no authority to control the office of the sheriff because the sheriff's statutory power to control and operate the jail was "independent of and unalterable by any governing body." *Id.* at 929. Moreover, the court stated, the sheriff was a constitutional officer whose existence did not depend on any employment contract, express or implied, with Cook County. *Id.* at 930. The above reasoning is dispositive in the instant case. The County of Kankakee lacks authority to enact any official policy, custom, or practice over the Sheriff's office. Rather, only the Sheriff of Kankakee, and not Kankakee County, controls the operations of the JCDC. *See supra; see also*, 55 ILCS 5/3-6017 (West 1991). Therefore, Kankakee County cannot be held liable for the alleged acts of the Defendants and is thus entitled to summary judgment.

Further, Plaintiff has no evidence of any unlawful official policy, custom or practice that caused Plaintiff's alleged constitutional injuries. A governmental entity is liable for damages only when the plaintiff shows that the alleged constitutional violation occurred as a result of an official policy, custom, or practice. *Monell v. Dep't. of Social Servs.*, 436 U.S. 658, 694 (1978). Specifically, "[l]iability is demonstrated in three ways: '(1) by an express policy that, when enforced, causes a constitutional deprivation; (2) by a widespread practice

that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law; or (3) by a showing that the constitutional injury was caused by a person with final policymaking authority.' *Ross*, 2006 WL at *2 *(quoting Franklin v. City of Evanston*, 384 F.3d 838, 843 (7th Cir. 2004)).

Plaintiff has failed to present any evidence that Chief Downey or Kankakee County exercised any official policy, custom, or practice to use excessive force or acted with deliberate indifference to Plaintiff's serious medical needs. In fact, Plaintiff testified that he sued Defendant Downey only because he is the Chief of Corrections at the JCDC (Defs. Stat. Fact ¶ 64). Plaintiff has no evidence of any official policy, custom or practice regarding Plaintiff's claims (*Id.* ¶ 65). Finally, Plaintiff admitted that he sued Kankakee County only because other inmates have sued Kankakee County in the past (*Id.* ¶66). Such admissions clearly demonstrate that Plaintiff's official capacity claims are insufficient as a matter of law and that Defendants Kankakee County and Chief Michael Downey are entitled to summary judgment.[3]

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3. In any event, Plaintiff cannot maintain his official capacity claims against Kankakee County and Chief Michael Downey if there is no finding against the individual officers on the underlying claims. *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S. Ct. 1571 (1986); *Durkin v. City of Chicago*, 341 F.3d 606, 615 (7th Cir. 2003); *Hadi v. Horn*, 830 F.2d 779, 782 (7th Cir. 1987).

Appendix B

There are no triable issues of fact regarding Plaintiff's claims of deliberate indifference to his serious medical needs. Plaintiff's claims of deliberate indifference to his serious medical needs are without merit for several reasons. First, Plaintiff has admittedly not filed any grievances regarding these incidents, and, therefore, his medical care claims are barred by the Prisoner Litigation Reform Act. (Defs. Stat. Facts, ¶¶ 61-63). Furthermore, Plaintiff has failed to present any triable issues of fact demonstrating that he suffered from a serious medical condition or that Nurse Flageole was deliberately indifferent to Plaintiff's alleged medical requests. Therefore, Defendants are entitled to summary judgment.

Plaintiff's claims of deliberate indifference are barred by the Prisoner Litigation Reform Act as Plaintiff failed to grieve his complaints to JCDC officials. Plaintiff has alleged that Nurse Flageole denied him medical treatment on October 22, 2005, January 3, 2006, and February 5, 9, and 14, 2006. Although Plaintiff admittedly filed grievances concerning other issues during his incarceration at the JCDC, Plaintiff never filed any grievances regarding these alleged denials of medical treatment. (Defs. Stat. Facts, ¶¶ 6-7, 21-22, 37-38, 56-59, 61-63). The JCDC Inmate Handbook explicitly provides the grievance procedure, requiring that an inmate submit a grievance to Correction staff regarding any complaint about jail conditions. (*Id.* ¶ 61). Plaintiff, however, filed only medical requests, and he has admitted that such requests were not grievances. (*Id.* ¶ 63). Thus, Plaintiff is barred from pursuing his

deliberate indifference to serious medical needs claims pursuant to the Prisoner Litigation Reform Act. 42 U.S.C. § 1997(e)(a); *Porter v. Nussle*, 534 U.S. 516, 520, 122 S. Ct. 983, 986 (2002); *Massey v. Wheeler*, 221 F.3d 1030, 1034 (7th Cir. 2000); *Perez v. Wisconsin Dept. of Corrections*, 182 F.3d 532, 537-38 (7th Cir. 1999). Accordingly, Defendants are entitled to summary judgment.

Further, Plaintiff's claims of deliberate indifference are without merit as Plaintiff has failed to demonstrate a sufficiently serious medical condition. A section 1983 claim of deliberate indifference requires that the plaintiff show that he suffered from an objectively serious medical condition. *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970 (1994); *Pierson v. Hartley*, 391 F.3d 898, 902 (7th Cir. 2004). An objectively serious medical condition is one that "'has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.'" *Moralis v. Flageole*, No. 06 C 2034, 2007 WL 2893652, *14 (C.D.Ill. Sept. 28, 2007) (*quoting Chapman v. Keltner*, 241 F.3d 842, 845 (7th Cir. 2001)). "An objectively serious condition also presents itself if 'failure to treat it could result in further significant injury or unnecessary and wanton infliction of pain.'" *Moralis*, 2007 WL 2893652, *14 (*quoting Reed v. McBride*, 178 F.3d 849, 852 (7th Cir. 1999)).

The federal courts have consistently held that minor medical conditions do not objectively rise to the level of

a serious medical condition. For example, in *Pinkston v. Madry*, the Seventh Circuit held that a split lip and swollen cheek were not sufficiently serious medical conditions. *Pinkston*, 440 F.3d 879, 891 (2006). In *Davis v. Jones*, the Seventh Circuit also held that a one-inch laceration to an arrestee's head and a scraped elbow were insufficiently serious. *Davis*, 936 F.2d 971, 972-73 (1991). In *Gibson v. Ramsey*, the Northern District held that simply "(w)aking up with back pain [and] taking Tylenol to relieve the pain, does not state a serious medical condition." *Gibson*, No. 99 C 5315, 2004 WL 407025, *7 (N.D.Ill. Jan. 29, 2004); *see also Baldwin v. Tessier*, No. Civ. A. 05-10898-DPW, 2006 WL 753244, *8 (D.Mass. March 22, 2006) (holding that lower back pain and headaches are not sufficiently serious medical conditions). Similarly, in *Lilly v. Torhorst*, the district court held that a hunger strike, absent a coma, was not only insufficiently serious, but also, "senseless and legally meritless." *Lilly*, No. 06-C-008-C, 2006 WL 335458, *6 (W.D.Wis. Feb. 13, 2006). Plaintiff has alleged in the instant case that he suffered from minor back, hunger, and knee pain. Based on the above case law, such conditions are not objectively serious to trigger Defendants' constitutional duties. Accordingly, Defendants are entitled to summary judgment as to Plaintiff's medical care claim.

On September 20 and 27, 2005, per Plaintiff's complaint of back pain, JCDC certified physician's assistant, Kristy Patterson, examined Plaintiff's lower back. (Defs. Stat. Facts, ¶¶ 4-5). During both of Patterson's examinations, Patterson found only mild

minor muscle pain. Patterson did not order a bottom bunk for Plaintiff nor did she believe that a bottom bunk was medically necessary. (*Id.* at ¶ 9). On October 21, 2005, Plaintiff submitted a medical slip requesting a bottom bunk because of back pain. (*Id.* ¶ 6). Unless an inmate presents an obvious debilitating condition, such as paralysis or seizures, it is the policy and practice at the JCDC that only a physician or physician's assistant may prescribe a lower bunk. (*Id.* ¶ 8). On October 22, 2005, Nurse Flageole informed Plaintiff that he could not have a bottom bunk, because Plaintiff's examining physician never ordered it. (*Id.* ¶ 7). Although Plaintiff has claimed that this refusal denied him medical treatment for a sufficiently serious medical condition, Plaintiff has not presented any evidence that he incurred an injury after these examinations or that the JCDC policy caused him significant injury. Furthermore, there is no evidence that Patterson's diagnosis and treatment resulted in significant injury or the unnecessary and wanton infliction of pain upon Plaintiff. In fact, according to the case law noted supra, the minor nature of Plaintiff's complaints, and the absence of any medical order by a physician for Plaintiff to have a lower bunk, Plaintiff's back pain is insufficiently serious under the Eighth Amendment. *See supra*, *Gibson*, 2004 WL 407025, at *7; *Baldwin*, 2006 WL 753244, *8.

On January 1, 2006, Plaintiff again requested a bottom bunk. (Defs. Stat. Facts, ¶ 21). However, in the two weeks prior to this request, Plaintiff had been re-examined by Patterson who again diagnosed Plaintiff with only minor back pain. (*Id.* ¶ 15). Patterson ordered

x-rays of Plaintiff's lower back, and she referred Plaintiff to physical therapy to assist with the minor pain. (*Id.*). After Plaintiff's lower back was x-rayed on December 20, 2005, two doctors at Provena-St. Mary's Hospital reviewed Plaintiff's x-rays and unanimously concluded that Plaintiff's lower back presented no abnormalities. (*Id.* ¶¶ 17-19). Ms. Patterson concurred with their assessment. (*Id.* ¶¶ 18-19). From January 4, 2006 until January 20, 2006, Plaintiff attended physical therapy on five occasions. (*Id.* ¶ 23). Based upon these extensive examinations, treatment, and therapies, Patterson neither ordered a lower bunk nor believed that a lower bunk was medical necessary. (*Id.* ¶¶ 9, 19). Moreover, at no time did Patterson or any other physician diagnose Plaintiff with anything other than mild muscular back pain. As noted supra, such a minor injury is insufficiently serious, and therefore, Defendants are entitled to summary judgment. *See supra*, *Gibson*, 2004 WL 407025, at *7; Baldwin, 2006 WL 753244, *8.

On February 4 and 8, 2006, Plaintiff complained of hunger symptoms resulting from a voluntary hunger strike (Defs. Stat. Facts, ¶¶ 37, 56-57). Such a self-inflicted condition, however, "does not rise to the level of a serious medical need . . . as long as it remains within [plaintiff's] power to end the strike." *Lilly*, 2006 WL 335458, at 6. Plaintiff testified that he voluntarily continued the hunger strike and incurred only self-inflicted hunger symptoms. (Defs. Stat. Facts, ¶¶ 52-55). Plaintiff further testified that JCDC officials still came to his cell and provided him three meals daily. (*Id.* ¶ 54).

Therefore, Plaintiff's claim relating to his hunger strike conditions do not support a due process violation. *See* Lilly, 2006 WL 335458, at *6.

On February 12, 2006, Plaintiff requested to resume physical therapy and receive pain relievers because of pain in his knee and lower back. (Defs. Stat. Facts, ¶ 58). On February 14, 2006, Nurse Flageole responded to Plaintiff's request and informed Plaintiff that he could order pain relievers from commissary. (*Id.* ¶ 59). Plaintiff, however, alleges that Nurse Flageole's response exhibited deliberate indifference to his serious medical condition because it delayed the healing of his lower back and knee. Plaintiff's own deposition testimony and his medical records, however, refute these allegations. Plaintiff testified that he incurred no new injury because of this alleged denial of medical treatment. (*Id.* ¶ 60). Furthermore, Plaintiff testified that he injured his knee on January 26, 2006. (*Id.* ¶¶ 31-32). However, on January 27, 2006, when Nurse Flageole examined Plaintiff's knee, per Plaintiff's request, Plaintiff exhibited a full range of motion, and no evidence of edema, trauma, or injury of any kind to his knee. (*Id.* ¶¶ 33-34). Regarding Plaintiffs lower back, within the previous three-and-a-half months, Plaintiff attended physical therapy at Provena-St. Mary's Hospital at least five times, received home exercises for his lower back from Patterson and Provena, was examined by Patterson on three separate occasions, and had x-rays taken of his lower back—none of which disclosed anything other than mild muscle pain—an injury insufficiently serious under the Eighth Amendment. (*Id.* ¶¶ 4-5, 8-20, 23;

see supra). Significantly, Plaintiff has not proffered any medical or physical evidence refuting these findings.

Plaintiff has failed to demonstrate that Defendants were deliberately indifferent to his medical needs. A section 1983 claim of deliberate indifference requires that the plaintiff show not only that the medical condition from which he suffered is objectively serious, but also, subjectively, that prison officials knew of, but disregarded, the need for treatment. *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970 (1994); *Pierson v. Hartley*, 391 F.3d 898, 902 (7th Cir. 2004). "The Constitution 'does not mandate comfortable prisons,'" but authorizes "'restrictive and even harsh'" prison conditions. *Farmer*, 511 U.S. at 832-34 (*quoting Rhodes v. Chapman*, 452 U.S. 337, 347-49, 101 S.Ct. 2392, 2399-400 (1981)). Deliberate indifference requires more than simple negligence or that the official knew or should have known of the risk; rather, the official must actually know of "a substantial risk of serious harm and consciously disregarded it." *Pierson v. Hartley*, 391 F.3d 898, 902 (7th Cir. 2004) (*citing Haley v. Gross*, 86 F.3d 630, 641 (7th Cir. 1996)). Even a prisoner's dissatisfaction with a prescribed course of treatment does not create a constitutional claim unless the medical treatment is so "blatantly inappropriate" to evidence intentional mistreatment. *Snipes v. DeTella*, 95 F.3d 586, 592 (7th Cir. 1996).

As noted supra, Plaintiff has complained that because he was denied a bottom bunk on October 22, 2005, he incurred prolonged back pain. However, within

30 days of Plaintiff's October 21, 2005, request, JCDC physician's assistant, Kristy Patterson examined Plaintiff's lower back on two separate occasions and provided Plaintiff lower back exercises to do in his cell. (*Id.* ¶¶ 4-5). It is the policy of the JCDC that only a physician or physician's assistant may prescribe a lower bunk, unless a prisoner presents an obvious and serious medical injury necessitating a lower bunk. (*Id.* ¶ 8). Patterson, however, neither prescribed a bottom bunk for Plaintiff nor believed that a bottom bunk was medically necessary. (*Id.* ¶ 9). Furthermore, the record is devoid of any evidence that Plaintiff incurred an injury after these examinations or that Patterson's diagnosis and treatment were blatantly inappropriate. Given such undisputed facts, the record is devoid of any evidence that Nurse Flageole consciously disregarded a substantial risk of serious harm to Plaintiff.

Plaintiff's complaint that he was denied a bottom bunk on January 3, 2006, and incurred prolonged back pain as a result, necessitates the same conclusion as Plaintiff's October 22, 2005, claim. As noted supra, JCDC physician's assistant, Kristy Patterson, re-examined Plaintiff's lower back on December 15, 2005, ordered x-rays, and referred Plaintiff to physical therapy. (*Id.* ¶ 15). On December 20, 2005, x-rays were taken of Plaintiff's lower back, and the results of these examinations were provided to Plaintiff on January 3, 2006. (*Id.* ¶¶ 17-19, 22). Beginning January 4, 2006, and continuing until January 20, 2006, Plaintiff received physical therapy for his lower back on five occasions. (*Id.* ¶ 23). Again, Patterson neither ordered a bottom

bunk for Plaintiff nor believed that one was necessary. (*Id.* ¶ 9). Given such continuous treatment, Patterson's belief that a lower bunk was not medically necessary, and that Plaintiff received responses and/or treatment to his October 21, 2005, and January 1, 2006 requests within three days of each request, Nurse Flageole was not deliberately indifferent to Plaintiff's medical needs. *See also Nunley v. Mills*, 217 Fed.Appx. 322, 324 (5th Cir. 2007) (holding that claim of deliberate indifference to medical treatment failed upon evidence demonstrating that lower bunk and cane were not medically necessary).

Defendants were also not deliberately indifferent to either of Plaintiff's medical requests on February 4th and 8th, 2006. As noted supra, Plaintiff complained on each of these dates of only hunger related symptoms. (Defs. Stat. Facts, ¶¶ 37, 56). Nurse Flageole responded to each of Plaintiff's requests within—at most—two days of their submission. (*Id.* ¶¶ 38, 57). Furthermore, Plaintiff admitted that he experienced these symptoms because he voluntarily choice not to eat, and that despite this, officers still came to his cell and provided him three meals a day. (*Id.* ¶¶ 51-54). Accordingly, Nurse Flageole was not deliberately indifferent to Plaintiff's medical needs. *See supra, Lilly*, 2006 WL 335458, at *6.

As discussed supra, on February 12, 2006, Plaintiff requested to resume physical therapy and receive pain relievers because of pre-existing knee and lower back pain. (Defs. Stat. Facts, ¶¶ 58-59). Nurse Flageole responded to Plaintiff's request on February 14, 2006,

and informed Plaintiff that he could order pain relievers from the commissary. (*Id.* ¶ 59). Although Plaintiff alleges that such a response evinces deliberate indifference to serious medical needs, Plaintiff's record of treatment denotes otherwise. According to Plaintiff, his knee was injured on January 26, 2006. (*Id.* ¶ 31). On January 27, 2006, per Plaintiff's request, Nurse Flageole examined Plaintiff's knee and found no evidence of edema, trauma, or injury of any kind to Plaintiff's knee. (*Id.* ¶¶ 32-34). Regarding Plaintiff's lower back, within the previous three-and-a-half months, Plaintiff attended physical therapy at Provena-St. Mary's Hospital five times, received home exercises for his lower back from Patterson and Provena, was examined by Patterson on three separate occasions, and had x-rays taken of his lower back—none of which contained a diagnosis of significant injury or that Plaintiff required a lower bunk. (*Id.* ¶¶ 3-5, 9-12, 15-20, 23). Therefore, given Plaintiff's continuous treatment and the absence of any significant injury or diagnosis by a physician, Nurse Flageole was not deliberately indifferent to Plaintiff's medical needs in permitting Plaintiff to order pain pills from the commissary.

Turning to Plaintiff's claim of excessive force, the court finds that the force applied to Plaintiff was done in a good faith effort to maintain discipline and jail security and not to maliciously or sadistically cause harm to Plaintiff. The Eighth Amendment prohibits unnecessary and wanton infliction of pain on prisoners. *See Hudson v. McMillian*, 503 U.S. 1, 7 (1992). Although claims brought by pretrial detainees are analyzed under

the Due Process Clause, the same basic Eighth Amendment standards apply. *Wilson v. Williams*, 83 F.3d 870, 875 (7th Cir. 1996). The core judicial inquiry is whether the force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm. *See Hudson*, 503 U.S. at 7. To determine if the force was legitimate or malicious, the courts consider several factors, including the need for the force, the amount of force, the threat an officer reasonably perceived, the effort made to temper the severity of the force used, and the extent of the injury that the force caused. *Id.*; *De Walt v. Carter*, 224 F.3d 607, 619 (7th Cir. 1999). To defeat summary judgment, the plaintiff must present evidence supporting a reliable inference of wantonness in the infliction of pain. *Fillmore v. Page*, 358 F.3d 496, 504 (7th Cir. 2004).

De minimus use of force does not state a claim unless the use of force is "repugnant to the conscience of mankind." *Hudson*, 503 U.S. at 9-10. The Supreme Court has also stated that when actual unrest and violence arises in a prison, the admonition that "'a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators' carries special weight" *Whitely v. Albers*, 475 U.S. 312, 321, 106 S. Ct. 1078, 1085 (1986) (*citing Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 132 (1977) and *quoting Rhodes v. Chapman*, 452 U.S. 337, 349 (1981)); *see also Hudson*, 503 U.S. at 9 (not every malevolent touch by a prison guard gives rise to an excessive force claim even if the force may later seem

unnecessary in the peace of a judge's chambers). For instance, in *Caldwell v. Moore*, plaintiff, over the span of seven hours, requested to be removed from isolation several times. *Moore*, 968 F.2d 595, 596-98 (4th Cir. 1992). Each time correctional officers' refused plaintiff, plaintiff yelled for the jailor and kicked his cell door. *Id.* at 596. Police officers then came to the jail and without training in the use of stun guns or how to deal with an extremely agitated or mentally disturbed inmate, warned plaintiff once that he would be shocked, before shocking plaintiff several times, placing him a straitjacket and leaving plaintiff on the floor. *Id.* at 596-98. In denying plaintiff's excessive force claim, the court agreed with the Seventh Circuit that "there are only so many choices available to the correctional officer" when an inmate refuses an order and "[i]t is not unreasonable for the jail officials to conclude that the use of a stun gun is less dangerous for all involved." *Id.* at 602 *(quoting Soto v. Dickey*, 744 F.2d 1260, 1267 (7th Cir. 1984) and *citing Michenfelder*, 860 F.2d 328, 335-36 (9th Cir. 1988)).

In *Henderson v. Gordineer*, plaintiff was shocked with a taser gun after he snatched a bottle of medication, poured pills in his mouth, and ignored warnings to stop. *Henderson*, No. 3:06-1425-TLW-JRM, 2007 WL 840273, *7 (D.S.C. March 14, 2007). In granting defendants' summary judgment motion, the court found dispositive that plaintiff showed only de minimus injuries, admitted snatching the medications, and that plaintiff disobeyed the officer's order. *Id.* at *8; *see also Hollgarth v. Dawson et al.*, No. 05-2125, 2007 WL 2812151, *12 (C.D.Ill. Sept. 19, 2007) (holding that failure to complain to officers or

medical personnel of injury evidences de minimus injuries insufficiently serious to maintain claim); *see also Norman v. Taylor*, 25 F.3d 1259, 1262-1263 (4th Cir. 1994) (en banc), cert. denied, 513 U.S. 1114, 115 S. Ct. 909 (1995) (holding that an excessive force claim should not lie where a prisoner's injury is de minimus); accord, *Fischer v. Ellegood*, 238 Fed.Appx. 428, at *3 (11th Cir. 2007) and *Gilchrist v. Reid*, *No.* 3:05-3338 PMD, 2006 WL 2927436, *4-5 (D.S.C. Oct. 11, 2006).

On January 26, 2006, Plaintiff and another inmate were engaged in a verbal altercation. (Defs. Stat. Facts, ¶ 24). Plaintiff admitted that the altercation escalated and that he threw the first punch. (*Id.* ¶¶ 25-27). Plaintiff further admitted that he had been sanctioned "quite a few times" for attempting to fight, had been previously involved in an altercation with the other inmate, and that Plaintiff ignored the announcement mandating all inmates to return to their cells. (*Id.* ¶¶ 25, 28). Plaintiff continued to fight the other inmate for approximately one to two minutes, and even continued to grab and punch the inmate even when Officer Schloendorf attempted to restrain Plaintiff. (*Id.* ¶¶ 28-30).

Although Plaintiff has alleged that Officer Schloendorf choked him and that Officer Scattergoode[4] injured his knee, Plaintiff's medical records belie these allegations. The day following this incident, January 27, 2006, Plaintiff was examined by Nurse

4. Plaintiff did not name Officer Scattergoode as a Defendant in his Complaint.

Flageole. (*Id.* ¶¶ 31-33). At no time during this examination did Plaintiff complain about being choked or receiving any injury therefrom. (*Id.* ¶ 33). Although Plaintiff complained of knee pain, Nurse Flageole examined Plaintiff's knee and found that Plaintiff exhibited good strength in his knee, and that there was no evidence of discoloration, trauma, or injury. (*Id.* ¶ 34). Significantly, Plaintiff has not presented any evidence refuting Nurse Flageole's examination or demonstrating that Officer Schloendorf wantonly, maliciously or sadistically caused harm. Rather, the undisputed facts demonstrate that Officer Schloendorf—in his judgment as a correctional officer—exercised a good faith effort to use minimal force and restore discipline while Plaintiff continued to attack the other inmate. Given these facts, the reasonable actions of Officer Schloendorf, and the lack of evidence of even a de minimis injury by Plaintiff, Defendants are entitled to summary judgment as a matter of law. (*See, Id.* ¶¶ 24-34).

On February 6, 2006, Plaintiff testified that he rose from bed, pushed the intercom button in his cell, and "for some reason" requested medical treatment from a correctional officer. (Defs. Stat. Facts, ¶ 39). Plaintiff further testified that after telling the correctional officer to "forget about it," Plaintiff held up a bottle of pills and said: "I will take care of my pain myself." (*Id.* ¶¶ 40-41). Defendants Shreffler and Ayala, along with Corporal Woods[5], then came to Plaintiff's cell, which was

5. Plaintiff did not name Corporal Marlin Woods as a defendant in this action.

in disarray. (*Id.* ¶ 42). Plaintiff had thrown a medicine bottle against the wall of his cell, pills were scattered all over the cell floor, and a medicine bottle was underneath Plaintiff's bed. (*Id.*). Furthermore, Plaintiff admitted that after Defendant Shreffler ordered Plaintiff to stand up, Plaintiff refused the order, stating: "I was slug. The only thing I did was like . . . turn my head over and just looked at him." (*Id.* ¶¶ 43-44). Plaintiff was then momentarily shocked with a stun gun by Officer Shreffler. (*Id.* ¶ 45). Given these undisputed facts, Shreffler's actions were reasonable. Plaintiff admittedly showed the correctional officer the bottle of pills, stated that he "would take care of my pain myself," and refused Officer Shreffler's order to be restrained. (*Id.* ¶¶ 41, 44). Given Defendants' lack of knowledge of exactly what Plaintiff had consumed, how many pills Plaintiff had consumed, and Plaintiff's refusal to obey Shreffler, Officer Shreffler properly complied with his superior officer's order to momentarily stun Plaintiff. Furthermore, given Defendants' prior knowledge of Plaintiff's combative tendencies, including Plaintiffs recent fight with another inmate and "quite a few" sanctions for attempting to fight, it was reasonable for the officers to conclude that the use of a stun gun was less dangerous for all involved. (*Id.* ¶¶ 24-29). Moreover, Plaintiff admitted that Defendants did not act maliciously and sadistically to cause harm, but that the officers' "only mission was to come get the Motrins from me"; that the officers "had a good reason" to take the pills; and that the only injury incurred was a temporary shocking. (*Id.* ¶ 46). Such de minimus use of force was not repugnant to the conscience of mankind. Rather, the

Appendix B

Defendants exercised their professional judgment after Plaintiff refused their order and applied a minimal and good faith amount of force. Given such undisputed facts, Plaintiff's claim of excessive force on February 6, 2006, is without merit. Further, Defendant Ayala is dismissed from this suit as he lacked any personal involvement in the February 6, 2006, incident. Plaintiff has not alleged that Ayala inflicted any injury. Indeed, Plaintiff has testified that Officer "Shreffler did basically everything." (Lewis Dep., p. 183; *see also, Payne for Hicks v. Churchlich*, 161 F.3d 1030, 1039 (7th Cir. 1998) (cert. denied, 527 U.S. 1004 (1999)).

It is therefore ordered:

1. Pursuant to Fed. R. Civ. P. 56, the Defendants' motion for summary judgment is granted [87]. The clerk of the court is directed to enter judgment in favor of the Defendants and against the Plaintiff pursuant to Fed. R. Civ. P. 56. Any remaining matters are denied as moot, and this case is terminated, with the parties to bear their own costs.

2. If the Plaintiff wishes to appeal this dismissal, he may file a notice of appeal with this court within 30 days of the entry of judgment. Fed. R. App. P. 4(a)(4). A motion for leave to appeal *in forma pauperis* should set forth the issues the plaintiff plans to present on appeal. *See* Fed. R. App. P. 24(a)(1)(C). If the Plaintiff does choose to appeal, he will be liable for the $455.00 appellate filing fee

irrespective of the outcome of the appeal. Furthermore, if the appeal is found to be non-meritorious, the Plaintiff may also accumulate another strike under 28 U.S.C. 1915(g).

Enter this 2nd day of July 2008.

/s/ David G. Bernthal
David G. Bernthal
United States Magistrate Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED OCTOBER 27, 2009

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

October 27, 2009

Before

MICHAEL S. KANNE, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

ANNE CLAIRE WILLIAMS, *Circuit Judge*

No. 08-2960

No. 2:06-cv-02091-DGB

DARRYL L. LEWIS,

Plaintiff-Appellant,

v.

MICHAEL D. DOWNEY, et al.,

Defendants-Appellants.

Appendix C

Appeal from the United States District Court
for the Central District of Illinois.

David G. Bernthal,
Magistrate Judge.

ORDER

On consideration of the petition for rehearing and rehearing en banc, no judge in active service has requested a vote on the petition for rehearing en banc and the judges on the panel have voted to deny rehearing. It is therefore, ORDERED that rehearing and rehearing en banc are **DENIED**.